No. ____

IN THE

Supreme Court of the United States

DAVID D. BACH,
Petitioner,
v.

GEORGE E. PATAKI, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK; ELIOT SPITZER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK; JAMES W. MCMAHON, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE NEW YORK STATE POLICE; AND J. RICHARD BOCKELMANN, IN HIS OFFICIAL CAPACITY AS ULSTER COUNTY SHERIFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 19, 2005

QUESTIONS PRESENTED

1. Whether "the right of the people to keep and bear Arms," protected by the Second Amendment to the United States Constitution, applies to the States through the Fourteenth Amendment.

2. Whether New York's ban on the issuance of handgun licenses to nonresidents violates the Privileges and Immunities Clause of Article IV, § 2, of the United States Constitution.

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David D. Bach respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

This case involves two fundamental questions under the Constitution: whether the Second Amendment is incorporated through the Fourteenth Amendment to apply against the States, and whether under Article IV, § 2's Privileges and Immunities Clause the State of New York may deny the privilege of obtaining a license to carry a handgun to a nonresident who is willing to comply with every State requirement but is denied the opportunity to do so solely on the basis of nonresidency. Petitioner David D. Bach ("Bach") brought this challenge to New York's statutory handgun licensing regime, which excludes virtually all nonresidents from carrying or even possessing a handgun in New York for any purpose. Although the Second Circuit characterized Bach as a "model citizen," and although it accepted that Bach is willing to comply with all of the State's requirements for handgun possession—including submitting to the same background checks, licensing procedures, and monitoring efforts imposed upon residents—the Second Circuit held that it was obliged to reject Bach's constitutional challenge to New York's regime.

The Second Circuit based its holdings on two grounds, either of which warrants this Court's review. *First*, the court held that it could not even consider Bach's Second Amendment arguments or examine the constitutionality of the New York regime, because it had no choice but to follow this Court's antiquated decisions in *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886), until this Court overruled them. Those decisions, however, rest on constitutional underpinnings that this Court repeatedly has rejected as it has continually and consistently held that other rights under the Bill of Rights *are* incorporated as against the States under the Fourteenth Amendment. The question whether

the Second Amendment also is incorporated as against the States has been the subject of considerable ferment in the courts of appeals, with the Fifth and Ninth Circuits ruling that this Court's precedents undermine the position that States are not bound by the Second Amendment and five circuits holding that they are bound by *Presser* and *Cruikshank* until this Court overrules them.

Second, the Second Circuit rejected Bach's challenge to New York's exclusion of nonresidents from its licensing regime on the grounds that it violated the Privileges and Immunities Clause of Article IV, § 2, of the Constitution. That decision is flatly inconsistent with this Court's well-developed privileges and immunities doctrine. Under this Court's precedent, the State bears a heavy burden to justify such naked discrimination concerning important rights guaranteed to residents but denied nonresidents. The Second Circuit did not require the State to meet that burden to present a substantial justification for the discrimination and to demonstrate that the discrimination was narrowly tailored to its licensing goals. As it has done in past Privileges and Immunities Clause cases, this Court should grant a writ of certiorari to consider the constitutionality of New York's statutory scheme.

OPINIONS BELOW

The opinion of the district court (Pet. App. 34a-53a) is reported at 289 F. Supp. 2d 217. The opinion of the court of appeals (*id.* at 1a-33a) is reported at 408 F.3d 75.

JURISDICTION

The court of appeals entered its judgment on May 6, 2005. A timely petition for rehearing was denied on July 21, 2005. Pet. App. 54a. On October 11, 2005, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including December 19, 2005. *Id.* at 101a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth at Pet. App. 55a-100a.

STATEMENT OF THE CASE

A. This case involves a constitutional challenge to New York's gun licensing regime on the ground that it categorically prohibits nonresidents who do not work or own a business in the State from applying for or receiving a handgun license. New York criminalizes the possession of handguns and other firearms by individuals who do not have a valid New York license.

Plaintiff David Bach is a lawyer in the United States Navy's Office of General Counsel and a Commissioned Officer in the United States Naval Reserve with more than 25 years of service, including 12 years of active duty as a U.S. Navy SEAL. He holds a Department of Defense Top Secret Security Clearance and has extensive training and experience with firearms. *See* Summons and Complaint, *Bach v. Pataki, et al.*, No. 1:02cv1500, at 3 (N.D.N.Y. filed Nov. 29, 2002). Bach recently returned from a tour of active military duty in Iraq. Bach is a citizen of the Commonwealth of Virginia with no criminal record, and he has a license issued by that State to carry a concealed firearm—the same handgun he seeks to carry in New York. *See* Pet. App. 2a. Bach frequently drives to upstate New York, where he grew up, and where he, his wife, and his three young children visit his elderly parents. *Id.* Seeking to protect his family during their car trips to New York, Bach made inquiries to New York authorities about obtaining a gun permit in that State. *Id.* at 38a-39a. Those authorities advised him, however, that "[t]here are no provisions for the issuance of a carry permit, temporary or otherwise, to anyone not a *permanent* resident of New York State." *Id.* at 2a, 39a (emphasis added). Without a license, Bach's possession of a gun in the State would be a felony. *See* N.Y. Penal Law §§ 265.00(3), 265.20, 400.00.

Lacking any recourse through State channels, Bach filed suit in the United States District Court for the Northern District of New York on November 29, 2002, seeking a declaration that the State's absolute prohibition on licenses for nonresidents was unconstitutional, and requesting preliminary and permanent injunctive relief. The complaint alleged that the State's licensing regime was unconstitutional, on its face and as applied to Bach, on two principal grounds.[1] First, Bach alleged that New York's licensing law discriminated against nonresidents in violation of the Privileges and Immunities Clause of Article IV, § 2, which guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Pet. App. 55a. Bach also alleged that the licensing ban violated the right of nonresidents to "keep and bear Arms" protected by the Second Amendment of the United States Constitution. *Id.*

B. The district court granted the State's motion to dismiss the complaint on September 23, 2003. While acknowledging disagreement among the courts of appeals on the nature and scope of the right protected by the Second Amendment, the district court followed the lead of "most other circuit courts" and held that "the Second Amendment is not a source of individual rights." Pet. App. 45a, 46a. It also dismissed Bach's claim under the Privileges and Immunities Clause on the ground that the State had "valid reasons for the disparate treatment of nonresident travelers." *Id.* at 48a.

C. Bach timely appealed, and the Second Circuit affirmed the district court's dismissal. Unlike the district court, the court of appeals decided there was "no need" to enter into the "national legal dialogue" regarding the scope of the Second Amendment's protections. Instead, the court

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[1] Bach also alleged that the New York law violated the Equal Protection Clause and the substantive aspect of the Due Process Clause of the Fourteenth Amendment. The district court rejected those claims, and Bach did not challenge their dismissal in the court of appeals.

held "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts." Pet. App. 14a. The court of appeals believed this conclusion to be "compelled" by this Court's opinion in *Presser v. Illinois*, 116 U.S. 252 (1886). Pet. App. 15a.

In *Presser*, this Court rejected a challenge to an Illinois statute that made it unlawful for individuals who were not in the military or the state militia "to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof." 116 U.S. at 253. The Court rejected the constitutional challenge to that statute on the ground that "the [Second] [A]mendment is a limitation only upon the power of [C]ongress and the national government, and not upon that of the [S]tate." *Id.* at 265. The Court in *Presser* relied, in turn, on *United States v. Cruikshank*, 92 U.S. 542 (1876). *Cruikshank* involved a challenge by defendants convicted under the Enforcement Act, ch. 114, 16 Stat. 140 (May 31, 1870), for (among other things) unlawfully conspiring to intimidate black citizens with "an intent to hinder and prevent the exercise by the same persons of the 'right to keep and bear arms for a lawful purpose.'" 92 U.S. at 544-45. To prove a violation of the Act, the government had to show that "the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States." *Id.* at 549. The Court overturned the convictions on the ground that the Second Amendment did not protect any right against intrusion by other private citizens. Rather, the Court held that the Second Amendment "means no more than that [the right to keep and bear arms] shall not be infringed *by Congress*." *Id.* at 553 (emphasis added).

The court of appeals acknowledged that both the Fifth Circuit and the Ninth Circuit had expressed doubts about the continued validity of *Presser* and *Cruikshank*, because both rested on the now-discredited holding in *Barron v.*

Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). In *Barron*, this Court held that the entire Bill of Rights does not apply to the States. Two decades after *Cruikshank*, this Court rendered its first decision rejecting that conclusion by holding that certain rights protected under the first eight amendments are, in fact, incorporated against the States through the Due Process Clause of the Fourteenth Amendment. *See Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897). Nevertheless, the Second Circuit below held that, "even if a Supreme Court precedent was 'unsound when decided' and even if it over time becomes so 'inconsistent with later decisions' as to stand upon 'increasingly wobbly, moth eaten foundations,' it remains the Supreme Court's 'prerogative alone to overrule one of its precedents.'" Pet. App. 18a (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 9, 20 (1997)) (internal quotation marks omitted). The court stated that Bach's argument that *Presser* and *Cruikshank* were no longer good law had to be addressed to this Court, essentially inviting this Court's review of those antiquated precedents. *See id.*

The court of appeals also affirmed the district court's rejection of Bach's claim of residency discrimination under the Privileges and Immunities Clause. The court assumed, without deciding, that a license to carry a gun constitutes a "privilege" protected by Article IV, noting that this Court "'has never held that the Privileges and Immunities Clause protects only economic interests.'" *Id.* at 24a-25a (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 & n.11 (1985)). It also acknowledged that "[t]here is no question that New York discriminates against nonresidents in providing handgun licenses." *Id.* at 26a. Nonetheless, the court upheld New York's discriminatory licensing regime.

First, it credited the State's "monitoring interest" in "continually obtaining relevant behavioral information" about licensees. *Id.* at 27a. Then, it turned to the question whether the "degree of discrimination exacted" was "substantially related to the threatened danger." *Id.* at 28a. Although it acknowledged that this was the "more

difficult inquiry," the court concluded that the New York regime was justifiable because "New York can best monitor the behavior of those licensees who spend significant amounts of time in the State." *Id.* at 29a. The court concluded that it would be too "difficult for New York to monitor the behavior of mere visitors." *Id.* It also rejected Bach's contention that New York's monitoring interest could be adequately protected by the vigilance of the State of the licensee's residence, or that the behavioral information sought by New York could be obtained by means short of insisting on permanent residency or employment within its borders.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION DEEPENS A CIRCUIT CONFLICT ON WHETHER *PRESSER* AND *CRUIKSHANK* REMAIN GOOD LAW, A QUESTION ONLY THIS COURT CAN RESOLVE

The Second Circuit held that it was bound by this Court's decisions in *Presser* and *Cruikshank* to hold that the Second Amendment's "right to keep and bear arms" binds only the national government, and not the States. The Second Circuit's holding is in accord with four other circuits, but the Fifth and Ninth Circuits have disagreed. Those courts have stated that *Presser* and *Cruikshank* are no longer sound in light of the modern doctrine of incorporation. This Court's reconsideration of its prior decisions in *Presser* and *Cruikshank* is appropriate given the deepening division among the lower courts on an issue of national importance. If left to stand, the Second Circuit's holding, and that of other circuits, insulates state laws like New York's from any constitutional scrutiny whatsoever, regardless of how restrictive such laws are of the rights guaranteed by the Second Amendment.

A. *Presser* And *Cruikshank* Should Be Reevaluated In Light Of The Modern Doctrine Of Incorporation

As originally interpreted by this Court in *Barron*, the first eight provisions of the Bill of Rights applied only to the national government, and not to the States. The question, Chief Justice Marshall thought, was "of great importance, but not of much difficulty." 32 U.S. (7 Pet.) at 247. Because the Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states," it necessarily followed that the Bill of Rights should "be understood as restraining the power of the general government, not as applicable to the states." *Id.* The Fourteenth Amendment, however, expressly applies to the States, forbidding them from "deprivf ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Using the Bill of Rights for guidance, the Court has held the Fourteenth Amendment to "incorporate" all but four provisions of the Bill of Rights against state action.

In refusing to address the merits of P[illegible]h's Second Amendment claim, the Second Circuit relied on an outdated line of cases consisting of *Presser* and *Cruikshank*, which—along with *Miller v. Texas*, 153 U.S. 535 (1894)—adhered to *Barron*'s holding and have by now been thoroughly undermined by this Court's subsequent incorporation doctrine. That doctrine has led to the overruling of these same cases insofar as they had held that other provisions of the Bill of Rights applied only to the national government. *Barron*'s holding that the Takings Clause of the Fifth Amendment did not apply against the States was overruled in the earliest of the incorporation cases. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 480 n.10 (1987) (citing *Chicago, B. & Q.R.R.*, 166 U.S. 226). *Cruikshank*'s holding that the First Amendment right of peaceable assembly "was not intended to limit the powers of the State governments in

respect to their own citizens," 92 U.S. at 552, has long since been disavowed, *see Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). So too has *Miller*'s holding that the Fourth Amendment right against unreasonable searches and seizures cannot be enforced against the States. *See Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). Indeed, we have found no case from this Court rejecting incorporation of an individual right in the Bill of Rights as against the States since the Court began to render holdings under the modern incorporation doctrine.

It is thus clear that the doctrinal foundation of *Presser* and *Cruikshank* "has since been superseded by ratification of the Fourteenth Amendment and selective incorporation of the Bill of Rights." *Delaware v. Van Arsdall*, 475 U.S. 673, 706 (1986) (Stevens, J., dissenting). Even the Second Circuit acknowledged that these prior cases rest on "moth-eaten foundations" and are "inconsistent with later decisions." Pet. App. 18a (internal quotation marks omitted). These antiquated precedents thus provide a historically outdated answer to whether the Second Amendment applies to the States. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 653 (1989) ("The obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception. Why, that is, should *Cruikshank* and *Presser* be regarded as binding precedent any more than any of the other 'pre-incorporation' decisions refusing to apply given aspects of the Bill of Rights against the states?"); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1263-64 (1992). Yet this Court has never addressed whether, under modern incorporation doctrine, the Second Amendment's "right to keep and bear arms" should apply to the States. This case presents a perfect opportunity to do so.

There is no sound reason for excluding the Second Amendment's "right to keep and bear arms" from the panoply of rights protected against violation at the hands of state officials. The history of Reconstruction and the ratification of the Fourteenth Amendment make clear that the "right to keep and bear arms" was not intended to be excluded from incorporation against the States. For example, during Congress's discussion of the Fourteenth Amendment, Senator Jacob Howard of Michigan explained that the "great object" of Section 1 of the Fourteenth Amendment was to "restrain the power of the States" and keep them from abridging "the personal rights guarantied and secured by the first eight amendments of the Constitution," including "the right to keep and to bear arms." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Jacob Meritt Howard).

The passage by the Reconstruction Congress of the Civil Rights Act of 1866 and the Freedman's Bureau Act provides further evidence that the Second Amendment was intended to apply to the States. The Civil Rights Act entitled all "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude," "the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (Apr. 9, 1866). The Freedman's Bureau Act was even more explicit, providing that the "full . . . benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens." Freedman's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176 (July 16, 1866) (emphasis added). As Professor Amar has observed, "the Second Amendment right to bear arms—and presumably all other rights and freedoms in the Bill of Rights—were encompassed by both the Freedman's

Bureau Act and its companion Civil Rights Act." Amar, *The Bill of Rights*, 101 Yale L.J. at 1245 n.228.

The Second Amendment also meets the modern test for incorporation set forth in *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, the Court explained that "[t]he test for determining whether a right [should be] protected against state action by the Fourteenth Amendment has been phrased in a variety of ways." *Id.* at 148. The Court has inquired, variously, whether a right is "among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; whether it is "basic in our system of jurisprudence"; and whether it is a "fundamental right, essential to a fair trial." *Id.* at 148-49 (internal quotation marks omitted). At bottom, however, *Duncan* explained that the core inquiry, however formulated, is whether the right has traditionally been regarded as having a central place in the constitutional constellation. *See id.* at 151-56 (analyzing the historical roots of the jury trial right).[2] The Second Amendment easily meets this standard.

The right to keep and bear arms has been viewed by numerous scholars and commentators as fundamental since long before the Founding. Sir William Blackstone recognized the right to possess arms as one of the five

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[2] *Duncan* ushered in the modern doctrine of "selective" incorporation by rejecting this Court's previous insistence that a right be so "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people" that "a fair and enlightened system of justice would be impossible without them," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), a standard rarely satisfied. *See Duncan*, 391 U.S. at 149 n.14. Instead, *Duncan* deemed it sufficient that the right be fundamental within the distinctly "Anglo-American regime of ordered liberty." *Id.* (noting that this liberalization of the test was necessary to justify the incorporation of certain rights such as the exclusionary rule and the rule against prosecutors' commentary on the defendant's refusal to testify). *See also Patsone v. Pennsylvania*, 232 U.S. 138, 143 (1914) (Holmes, J.) (suggesting that the right to carry a firearm for self-defense is protected by the Fourteenth Amendment's liberty clause).

fundamental rights: "The fifth and last auxiliary right of the [s]ubject . . . is that of having arms for their defence." 1 William Blackstone, *Commentaries on the Laws of England* 139 (University of Chicago Press 1979) (1765). When the right to bear arms "came to America with English colonists," it, like the jury trial right at issue in *Duncan*, "received strong support from them." *Duncan*, 391 U.S. at 152. Fear of standing armies ran deep. *See, e.g.*, The Federalist No. 46 (James Madison). As Joseph Story wrote:

> The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them.

Joseph Story, *Commentaries on the Constitution of the United States* § 1001, at 708 (Carolina Academic Press 1987) (1833).

The States also recognized a right to keep and bear arms in their own laws. *Cf. Duncan*, 391 U.S. at 153 (noting that "[t]he constitutions adopted by the original States guaranteed jury trial," as did the constitutions of later-joining States). At the time of the Bill of Rights, almost half of the State bills of rights contained a similar right to keep and bear arms, and all of them recognized the importance of a populace with access to arms as a guarantee against tyranny. *See* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 54 (1996); David E. Young, *The Origin of the Second Amendment* at xxvi-xxix (Golden Oak Books 2d ed. 1995) (1991). Still today, 43 of the 50 States enshrine the right to "keep and bear" arms in their constitutions. *See* Lund, 31 Ga. L. Rev. at 54.

The historical evidence is plentiful that the Founders viewed the right to "keep and bear arms" to be an important principle in the pursuit of ordered liberty. Thus,

there are compelling reasons to conclude that the Second Amendment meets this Court's test for rights that warrant incorporation.

B. This Court's Consideration Is Appropriate Now Because Of The Deepening Circuit Conflict On This Important Question

This Court's resolution of the applicability of the Second Amendment against the States is appropriate given the division of views among the circuits. The issue of incorporation is an important one. The Second Amendment is one of only four provisions of the Bill of Rights that have not been incorporated against the States under the doctrine of "selective" incorporation—the others being the right against quartering soldiers, and the rights to grand and civil juries. *See* U.S. Const. amends. III, V, VII.[3] This Court has never explained its exclusion of those amendments, including the Second, from the panoply of rights deserving protection against state action. This case presents the Court with the opportunity to apply modern incorporation principles to the Second Amendment.

The question of incorporation of the Second Amendment in particular has significant practical consequences for the Nation. All 50 States have passed myriad laws restricting, to varying degrees, individuals' rights to purchase, possess, and carry firearms of all kinds. *See generally* U.S. Department of Justice, *Survey of State Procedures Related to Firearm Sales, Midyear 2004*, at 20-74 (Aug. 2005) ("DOJ Statistics Report"), http://www.ojp.

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[3] As Bach argued below, the Second Circuit has, in fact, concluded that the "Third Amendment is incorporated into the Fourteenth Amendment for application to the states." *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982). But the panel here concluded that *Engblom*'s incorporation of the Third Amendment "in the absence of a Supreme Court decision doing so" was "not relevant to the question before us," because it did not address the issue "whether this Court can overrule the Supreme Court" and incorporate the Second Amendment. Pet. App. 18a n.24. The Second Circuit concluded that it was bound to follow *Presser* until it was overruled by this Court.

usdoj.gov/bjs/pub/pdf/ssprfsm04.pdf (surveying gun laws of the States and U.S. territories). Whatever the scope of the individual right protected by the Second Amendment, there is a strong need for clarifying whether that right applies at all to these types of state regulations.

The division among the courts of appeals amplifies the importance of revisiting this Court's prior precedents. Five of the eleven relevant circuits,[4] including the court below, continue to follow this Court's holdings in *Presser* and *Cruikshank*. These courts have not endorsed the outcome or reasoning of these cases, but simply have followed them as precedents of this Court that have never been overruled. *See, e.g.*, Pet. App. 14a & n.22 (citing cases); *People's Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942). As was the case here, all state laws restricting gun ownership and use will remain insulated from constitutional scrutiny until this Court reconsiders the 19th century decisions that provide the basis for those circuits' holdings that the Second Amendment is not incorporated against the States.

Both the Fifth and Ninth Circuits have, by contrast, disagreed with the continuing vitality of *Presser* and *Cruikshank*. In *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003), the Ninth Circuit stated that it views *Cruikshank* and *Presser* as "thoroughly discredited" given subsequent incorporation cases. *Id.* at 1066 n.17. The Ninth Circuit in *Silveira* technically did not reach the incorporation issue, because it held that, given the "collective" nature of the right, the plaintiffs in that case lacked standing to challenge California's gun laws on Second Amendment grounds. *Id.* at 1066. Because of the court's decision on standing, *Silveira*

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[4] Neither the Federal Circuit nor the D.C. Circuit would be expected to have occasion to address the incorporation question.

will likely be the Ninth Circuit's last word on the topic of incorporation of the Second Amendment.

The Fifth Circuit also has expressed its view that *Presser* and *Cruikshank* are no longer valid. In *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), the Fifth Circuit stated that *Presser*, *Cruikshank*, *Barron*, and *Miller* "all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us." *Id.* at 221 n.13. *Emerson* involved a defendant's Second Amendment challenge to his prosecution under the federal felon-in-possession law, 18 U.S.C. § 922(g), not a challenge to any state action. But, given this Court's admonition that lower courts must "follow the [Supreme Court] case which directly controls, leaving to this Court the prerogative of overruling its own decisions," *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), the Fifth Circuit cannot bring its view to bear on a Second Amendment challenge to state action. Nevertheless, the Fifth and Ninth Circuits' considered disagreement with five other circuits on this important issue strongly indicates the need for this Court's resolution. Indeed, there is no reason for this Court to wait for further percolation of this issue in the lower courts, as all those courts will remain indefinitely bound by *Presser* and *Cruikshank* until this Court reconsiders those decisions.

C. This Court Need Not Fully Define The Substantive Scope Of The Second Amendment's "Right To Keep And Bear Arms" To Resolve The Incorporation Issue

New York law absolutely prohibits the possession and carrying of handguns by virtually all nonresidents. Bach contends that these severe restrictions violate his Second Amendment "right to keep and bear arms." Notably, Bach

does not challenge New York's ability to require firearms licenses in the first instance, as he is willing to submit to the same licensing requirements imposed on residents. And he seeks only to carry—either in the open or concealed—the same type of handgun to be used for self-defense that New York licenses its own residents to possess. That New York does not permit Bach—whom the Second Circuit recognized as a "model citizen," Pet. App. 2a—to receive any individual consideration of his particular fitness and need to carry a handgun, even with a license, raises serious doubts as to whether such a restrictive law could survive constitutional scrutiny. Given, however, that the Second Circuit dismissed Bach's complaint on the basis of *Presser*, Bach respectfully requests that this Court grant certiorari on the threshold incorporation issue. If the Court decides that the Second Amendment applies to the States, it may then either decide Bach's challenge on the merits or remand to the Second Circuit for further consideration of whether New York's prohibition against nonresidents violates Bach's substantive constitutional rights.[5]

The substantive scope of the individual right guaranteed by the Second Amendment has been the subject of increasing debate among both courts and commentators. There are two principal camps, with some advocating that the Second Amendment protects a right to keep and bear arms for private purposes (the "individual rights" view), and others proposing that the right exists only when citizens are called together in the context of organized military service (the "collective rights" model). For example, the Ninth Circuit in *Silveira*, analyzing the text and history of the amendment, read the phrase "keep and bear arms" to refer "to the carrying of arms in military service—not the private use of arms for personal purposes." 312 F.3d at 1072. It thus held that "[t]he [Second]

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[5] Bach's constitutional challenge to New York's law included an as-applied challenge as well as a facial challenge. *See* Pet. App. 3a.

[A]mendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use." *Id.* at 1066. The Fifth Circuit in *Emerson* has taken a starkly different view of that language and history. That court has held that ownership and possession of firearms for nonmilitary, purely personal purposes *was* intended to be protected. That conclusion led the court to conclude "that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." 270 F.3d at 260. The issue has been vigorously debated in the academic literature as well. *See, e.g., Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citing scholarly articles on both sides of the debate).

This Court's pronouncements point toward the individual rights view. In *United States v. Miller*, 307 U.S. 174 (1939), the only decision of this Court squarely to address the Second Amendment, the Court confronted a challenge to an indictment charging the defendants with interstate transportation of an unregistered "Stevens shotgun having a barrel less than 18 inches in length," in violation of the National Firearms Act. *Id.* at 175. The district court held that the federal law violated the Second Amendment. In reversing and remanding, this Court declined to adopt the government's principal contention that the right secured by the Second Amendment is "only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." Brief of United States at 15, *United States v. Miller*, 307 U.S. 174 (Mar. 1939) (No. 696). Rather, the Court relied on the government's fallback position that the firearm at issue in that case—a shotgun with a barrel of less than 18 inches—was not among the class of "arms" covered by the Second Amendment. *See Emerson*, 270 F.3d at 223-24.

In the years since *Miller* was decided, statements made by members of this Court suggest agreement with a more individualistic view of the rights protected by the Second Amendment. Indeed, a number of the current Justices of this Court have expressed the view in other cases that the Second Amendment is among those constitutional rights guaranteed to individuals against state "abridgement." *See, e.g., Planned Parenthood v.* Casey, 505 U.S. 833, 848 (1992) (enumerating the "right to keep and bear arms" along with other individual rights protected by the Constitution) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)); *Albright v. Oliver*, 510 U.S. 266, 307 (1994) (Stevens, J., dissenting) (same); *Printz*, 521 U.S. at 937-38 (Thomas, J., concurring) ("The First Amendment . . . is fittingly celebrated for preventing Congress from 'prohibiting the free exercise' of religion or 'abridging the freedom of speech.' The Second Amendment similarly appears to contain an express limitation on the government's authority."); *id.* at 938 n.1, 939 (noting that in *Miller* "[t]he Court did not . . . attempt to define, or otherwise construe, the substantive right protected by the Second Amendment," but that "[p]erhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic'") (quoting 3 Joseph Story, *Commentaries* § 1890, at 746 (1833)). *See also* David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 St. Louis U. Pub. L. Rev. 99, 99 (1999) ("the thirty-five other Supreme Court cases which quote, cite, or discuss the Second Amendment . . . suggest that the Justices of the Supreme Court do now and usually have regarded the Second Amendment . . . as an individual right"); 1 Laurence H. Tribe, *American Constitutional Law* 901-02 n.221 (Foundation Press 3d ed. 2000) (1978) (concluding that the Second Amendment protects the right of "individuals to possess and use firearms in the

defense of themselves and their homes . . . a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action").

Likewise, the United States Department of Justice ("DOJ") recently performed an exhaustive review of the relevant case law, the text and structure of the Second Amendment, the relevant history, and the academic commentary concerning the Amendment. In its *Memorandum Opinion for the Attorney General* entitled "Whether the Second Amendment Secures an Individual Right" (dated Aug. 24, 2004), http://www.usdoj.gov/olc/secondamendment2.pdf,[6] the DOJ concluded that the "text and structure of the Constitution support the individual-right view of the Second Amendment," a view that "finds further support in the history that informed the understanding of the Second Amendment as it was written and ratified." *Id.* at 2 (noting that "the views of commentators and courts closest to the Second Amendment's adoption . . . reflect an individual-right view"). *See also* Senate Subcomm. on the Constitution, 97th Cong., *The Right to Keep and Bear Arms* at viii (Comm. Print 1982) ("What the Subcommittee on the Constitution uncovered was clear . . . proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms.").

The Court need not resolve this debate, however, to consider whether the right to keep and bear arms under the Second Amendment—whatever its substantive scope—should bind state and municipal entities as well as the national government. It is indisputable that the Second

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[6] Petitioner will lodge copies of this document with the Court upon request.

Amendment, by its plain language, protects a right of "the people." That right—like the right of "the people" against unreasonable searches and seizures in the Fourth Amendment—necessarily implies protection of some substantive sphere of liberty on the part of citizens against government authority. *See Printz*, 521 U.S. at 937-38 (Thomas, J., concurring).

Resolving whether the state and local governments as well as the national government are equally restricted does not require this Court in this case to define exactly when and under what circumstances the people's right to use and possess firearms exists, or can legitimately be restricted. In other contexts, this Court's jurisprudence regarding the substantive scope of constitutionally protected liberties has continued to evolve long after the question of incorporation was resolved. *Compare Wolf*, 338 U.S. at 27-28 (incorporating the Fourth Amendment's ban on unreasonable searches and seizures), *with Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to the States). Incorporation against the States is merely the opening step to allow jurisprudence concerning the Second Amendment similarly to evolve.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S LONGSTANDING PRIVILEGES AND IMMUNITIES JURISPRUDENCE

Article IV, § 2's Privileges and Immunities Clause provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. This Court has explained that "[i]t was undoubtedly the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), *overruled on other grounds by United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988).

Among other things, the Clause "inhibits discriminating legislation against [nonresidents] by other States," "it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness[,] and it secures to them in other States the equal protection of their laws." *Paul*, 75 U.S. (8 Wall.) at 180; *see Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978); *see also Saenz v. Roe*, 526 U.S. 489, 500 (1999) (the "right to travel" generally guarantees "the right of a citizen of one State . . . to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State").

While the Clause is "not an absolute," "[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). Accordingly, to justify differential treatment of nonresidents, the State must show that "there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398; *see Hicklin*, 437 U.S. at 526. Otherwise, discrimination on the basis of residency violates both the nonresident's individual rights and the limitations on state authority imposed by the principles of federalism. *See Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) ("The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism.") (footnote omitted).

New York's law clearly and categorically discriminates against nonresidents in the provision of licenses to possess or carry firearms. New York's law is among the most severe in its restrictions on licensing nonresidents. Most other States' laws allow nonresidents to obtain permits either through reciprocity arrangements with other States or by satisfying prescribed licensing standards applicable

to nonresidents.[7] Bach's case could not provide a better example of the law's severity: Bach was "statutorily ineligible" (Pet. App. 12a) from even applying for a license, despite his 25 years of service in the Navy Reserves, his 12 years of active duty as a Navy SEAL, his Department of Defense Top Secret Security Clearance, his extensive experience and training handling small firearms, and his license to carry a concealed handgun in the Commonwealth of Virginia. The sole reason why the State refused

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[7] *See* Ala. Code § 13A-11-85 (reciprocity); Alaska Stat. § 18.65.775 (reciprocity); Ariz. Rev. Stat. §§ 13-3112(U) (reciprocity), 13-3112(V) (allowing temporary possession by nonresidents with valid permits from their home state); Ark. Code §§ 5-73-309(2), 5-73-401 (reciprocity); Colo. Rev. Stat. § 18-12-213 (reciprocity); Conn. Gen. Stat. § 29-28(f) (allowing nonresidents with home-state permits to apply for a Connecticut license on the same terms and conditions as in-state residents); Fla. Stat. § 790.015 (allowing nonresidents with valid home-state licenses to carry a concealed handgun); Ga. Stat. Ann. §§ 16-11-126(e), 16-11-128(c); Haw. Rev. Stat. § 134-9(a) (allowing nonresident to show "exceptional" circumstances justifying a license); Idaho Code § 18-3302(12)(g) (nonresident with home-state license in his physical possession may carry a concealed weapon); Ind. Code § 35-47-2-21(b) (recognizing out-of-state licenses for nonresidents); Iowa Code § 724.11 (not recognizing out-of-state licenses, but allowing nonresidents to apply for a license upon terms and conditions applicable to in-state residents); Ky. Rev. Stat. § 237.110(17)(a) (reciprocity); La. Rev. Stat. § 40:1379.3(T)(1) (reciprocity); Me. Rev. Stat. tit. 25, § 2001-A(2)(F) (discretionary power to grant reciprocity to a holder of a valid concealed firearms permit issued in another State); Mich. Comp. Laws § 28.432a(f) (reciprocity); Minn. Stat. § 624.714, subd. 16 (reciprocity); Miss. Code § 45-9-101(19) (reciprocity); Mont. Code § 45-8-329 (reciprocity); Nev. Rev. Stat. § 202.3657(1) & (2) (governing nonresident applications for licenses); N.H. Rev. Stat. § 159:6-d (reciprocity); N.J. Stat. Ann. § 2C:58-4(c) (providing for applications by nonresidents); N.C. Gen. Stat. § 14-415.24 (reciprocity); N.D. Cent. Code § 62.1-04-03.1 (reciprocity); Ohio Rev. Code § 2923.126(D) (reciprocity); Okla. Stat. tit. 21, § 1290.26 (reciprocity); 18 Pa. Cons. Stat. § 6109(k) (reciprocity); R.I. Gen. Laws § 11-47-11 (providing for licensing of nonresidents who have a home-state license and show a "proper reason" and "suitab[ility]"); S.C. Code § 23-31-215(N) (reciprocity); S.D. Codified Laws § 23-7-7.3 (reciprocity); Tenn. Code § 39-17-1351(r) (reciprocity); Texas Gov't Code § 411.173(b) (reciprocity); Utah Code § 76-10-523(2) (reciprocity); Va. Code Ann. § 18.2-308(P) (reciprocity); W. Va. Code § 61-7-6(7) (reciprocity); Wyo. Stat. § 6-8-104(a)(iii) & (b)(i) (reciprocity).

even to entertain his application, and consider his eminent qualifications, was that he is not a permanent resident of the State of New York. The State and the court below acknowledged as much. *See* Pet. App. 2a-3a; *see also People v. Perez*, 325 N.Y.S.2d 183, 186 (N.Y. Sup. Ct. 1971) (noting that the law "seems discriminatory").

The Second Circuit upheld the law's constitutionality, however, on the ground that the State's interest in "monitoring" licensees justified excluding those who are not permanent residents of the State. In crediting the State's justification, the court violated two clear commands of this Court's privileges and immunities case law. First, the court of appeals accepted the State's justification without insisting, as this Court has, on evidence to support the alleged risks posed by nonresident licensees. *Compare Piper*, 470 U.S. at 285 ("There is no evidence to support [the State's] claim that nonresidents might be less likely to keep abreast of local rules and procedures."). Second, the court improperly rejected alternative means short of excluding nonresidents by which the State's monitoring interest could be preserved. *See Friedman*, 487 U.S. at 67. This Court's review is needed to prevent New York from persisting in its improper refusal to allow virtually all nonresidents, however qualified, from even applying for a handgun license. *Cf. Lunding v. New York Tax Appeals Tribunal*, 520 U.S. 1227 (1997) (granting certiorari to review New York's discriminatory tax law).

A. The Right To A Firearm License Is A "Privilege" Protected By Article IV, § 2

Although the Second Circuit deemed it unnecessary to reach the issue, Bach's right to apply for and, if qualified, to obtain a license to carry a firearm constitutes a "privilege" of citizenship that is protected by the Privileges and Immunities Clause of Article IV. Under this Court's cases, the "fundamental principles" protected by the Clause include the right of citizens to "the enjoyment of life and liberty . . . and to pursue and obtain happiness and safety." *Corfield v. Coryell*, 6 F. Cas. 546, 551-52

(C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J.). *See also Piper*, 470 U.S. at 281 n.10 (citing *Corfield* for question of "'fundamental rights' protected by the Clause"); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 387 (1978) (same). These need not be rights independently protected by the Constitution; the Clause allows nonresidents to engage in a number of pursuits that could be proscribed by the State if it were to do so without regard to residency. *See, e.g.*, *Toomer*, 334 U.S. at 396 (commercial shrimp fishing). Moreover, this Court has made clear that the privileges protected by the Clause include both commercial and noncommercial pursuits. *See Piper*, 470 U.S. at 282 (observing that this Court "has never held that the Privileges and Immunities Clause protects only economic interests"; emphasizing the commercial and "noncommercial role" of the legal profession in striking down state residence requirement for bar admission). Ultimately, the relevant test for protection is whether the right at issue is central to national citizenship, or whether it may be left to individual States to dispense as a perquisite of State citizenship. *See Baldwin*, 436 U.S. at 383 (although "'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity" must be respected for residents and nonresidents alike, some distinctions are allowed because they "merely reflect the fact that this is a Nation composed of individual States").

The right to self-defense through use of a firearm squarely falls into the protected category, as this Court previously has recognized. *See* Levinson, *Second Amendment*, 99 Yale L.J. at 651 (observing that, in a part of the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857), that the Court subsequently has never questioned, the Court concluded that the right of citizenship included, "in addition to the right to migrate from one state to another, . . . the right to possess arms"). This Court has also gone so far as to suggest that a ban on "pistols that may be supposed to be needed occasionally

for self-defense" might violate the "liberty" clause of the Fourteenth Amendment. *Patsone*, 232 U.S. at 143.

The right to personal safety, as ensured through the carrying of firearms, has deep historical roots. New York itself recognizes that the proposition that "decent citizens generally may employ means to defend themselves from ruffian or underworld aggression in an appropriate manner should hardly be open to debate." *People ex rel. Ferris v. Horton*, 264 N.Y.S. 84, 89 (N.Y. Sup. Ct. 1933), *aff'd*, 269 N.Y.S. 579 (N.Y. App. Div. 1934). As discussed above, the Founders viewed the right as important. *See supra* pp. 11-13. Today, virtually every State permits its own citizens to carry a concealed weapon for self-protection, usually with a license. *See* DOJ Statistics Report at 12.

Nonresidents such as Bach, no less than New York residents, have a "substantial stake" in their personal safety and self-defense when traveling throughout or staying within the State. This Court has concluded that, "[j]ust as the Privileges and Immunities Clause . . . protects persons who enter other States to ply their trade, so must it protect persons who enter Georgia seeking the medical services that are available there." *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (citations omitted). The right to protect one's safety, or the safety of one's family, is no less "fundamental" than the right to protect one's health through guaranteed access to medical services. *See also Friedman*, 487 U.S. at 68 (observing nonresident's "substantial stake in the practice of law in Virginia"). New York therefore must substantially justify its discrimination in denying this privilege to nonresidents.

B. The Second Circuit's Decision Conflicts With This Court's Requirement That The State Justify Discrimination Through A Showing That Nonresidents Are The "Peculiar Source" Of An Evil That The State Cannot Address Through Less Restrictive Means

To show sufficient justification for denial of a protected privilege to nonresidents, the State bears the burden

under this Court's cases to demonstrate that "'(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (quoting *Piper*, 470 U.S. at 284). Put differently, the State must establish that nonresidents are the "peculiar source of the evil" to which the statute is narrowly tailored. *Toomer*, 334 U.S. at 398. Both requirements are dictated by this Court's clear holdings, and the Second Circuit's failure to require a substantial justification from the State violates settled law.

The court of appeals improperly deferred to the State's assertion of substantial need without any factual showing to support it. The court held that "New York's monitoring interest is, in essence, an interest in continually obtaining relevant behavioral information." Pet. App. 27a. The court then simply opined that it was "self-evident that, at least in Bach's case, other States, like Virginia, cannot adequately play the part of monitor for the State of New York or provide it with a stream of behavioral information approximating what New York would gather. They do not have the incentives to do so." *Id.* at 29a.

The court of appeals' "self-evident" observation is highly disputable, and the State proffered no evidence whatsoever to support it. *Compare Piper*, 470 U.S. at 285 ("There is no evidence to support [the State's] claim that nonresidents might be less likely to keep abreast of local rules and procedures."). Indeed, the court ignored the fact that Bach is licensed in Virginia, which therefore has a clear incentive to monitor Bach to ensure that his continued licensing in that State is proper. New York's unsubstantiated assumption that Virginia or other States would be less vigilant in monitoring their own citizens who are licensed to carry handguns is precisely the kind of discrimination that the Privileges and Immunities Clause was meant to prohibit. The court should not have credited that assumption without insisting on some evidence

that other States' monitoring of their own licensed citizens in general—and Virginia's, in particular—is less effective than the type of monitoring that New York can provide. Indeed, the State did not even present evidence that its monitoring of its own residents was effective.

Moreover, under this Court's case law, a discriminatory remedy is a last resort and must fail where there are "less restrictive means" of remedying out-of-state harms, *Piper*, 470 U.S. at 284, "even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy," *Hicklin*, 437 U.S. at 526. Here, the court of appeals improperly dismissed a number of less restrictive alternatives that would have satisfied the State's legitimate interests without denying Bach the opportunity to be eligible for a license. As Bach argued below, New York could simply do as many other States do—*i.e.*, recognize, through reciprocity agreements, a valid out-of-state handgun license. If Bach's Virginia license were revoked, his rights to possess or carry a handgun in New York could likewise be terminated. The State also could require more frequent and more rigorous proof of qualification from nonresident applicants—*e.g.*, more frequent renewals; certification from local and state authorities where the applicant is domiciled that he or she has not been convicted of a crime and meets other qualifications; or periodic interviews by the nonresident licensee with local officials. *See Friedman*, 487 U.S. at 69 (noting the existence of alternatives such as "requir[ing] mandatory attendance at periodic continuing legal education courses" or mandatory "*pro bono* work"). If the State had evidence of higher costs of investigation or enforcement, the State simply could require higher application fees for nonresidents to offset those costs. *See Toomer*, 334 U.S. at 398-99 ("The State is not without power . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden."). The court below erred in dismissing these alternatives as inadequate without development of any factual record.

Finally, the monitoring rationale credited by the court of appeals is at odds with this Court's recent decision in *Granholm v. Heald*, 125 S. Ct. 1885 (2005). That decision struck down under the Dormant Commerce Clause Michigan and New York laws that regulated the sale and importation of wine by out-of-state wineries. Among the justifications for the law proffered by New York was the same monitoring justification advanced here—that the State had to require out-of-state wineries to maintain a physical presence in the State to facilitate tax-collection and regulation and monitoring of behavior. The Court opined that "New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping," and that "[t]he State offers no reason to believe the system would prove ineffective for out-of-state wineries." *Id.* at 1906. Likewise, the Court observed "that improvements in technology have eased the burden of monitoring out-of-state wineries," and thus "the States provide little *concrete evidence* for the sweeping assertion that they cannot police direct shipments by out-of-state wineries." *Id.* at 1907 (emphasis added). In *Granholm*, this conclusion was fatal to New York's attempt to justify the discriminatory statute, because "[t]he burden is on the State to show that the discrimination is demonstrably justified." *Id.* (internal quotation marks omitted). The same analysis dooms the New York law under Article IV, § 2.

New York's gun law is yet another in a line of New York statutes that engage in sweeping and unjustified discrimination against nonresidents. *See also Granholm*, 125 S. Ct. at 1885; *Lunding*, 522 U.S. at 298 (concluding that New York failed adequately to justify its discriminatory tax treatment of nonresidents); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 98 (2d Cir. 2003) (concluding that New York could not justify "the degree of outright discrimination imposed" against nonresidents in its "Lobster Law"). This Court's review is warranted because the court of appeals failed to hold the State to the

required constitutional standard for justifying such discrimination against nonresidents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 19, 2005

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-9123

DAVID D. BACH,
Plaintiff-Appellant,

v.

GEORGE PATAKI, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of New York

[Argued Oct. 1, 2004]

[Decided May 6, 2005]

Before: NEWMAN, McLAUGHLIN, and WESLEY, Circuit Judges.

WESLEY, Circuit Judge:

"The powers delegated by the . . . constitution to the federal government[] are few and defined. Those which are to remain in the state governments are numerous and indefinite."[1] This case concerns whether the Constitution requires New York to offer handgun licenses to visitors.

I

David Bach, a Virginia resident and domiciliary, wants to carry his Ruger P-85 9mm pistol while visiting his

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[1] THE FEDERALIST NO. 45 (James Madison).

parents in New York.[2] He has a permit from the Commonwealth of Virginia to carry a concealed weapon. Bach is a model citizen – he holds a Department of Defense top secret security clearance, is a commissioned officer in the United States Naval Reserve, a veteran Navy SEAL, a lawyer employed by the Navy's Office of the General Counsel, a father of three, and, perhaps most laudably, a son who regularly visits his parents in upstate New York. "During the ten-hour drive between Virginia and Upstate New York, [his] family and [he] travel on dimly lit rural roads and busy streets and highways[,] some of which are in densely populated areas that have extremely high violent crimes rates."[3] Bach has read "about unarmed, law-abiding citizens being slain by sadistic predators despite the exceptional efforts of law enforcement" and believes that carrying a pistol will help him protect his family.

However, as a nonresident without New York State employment, Bach is not eligible for a New York firearms license. The State Police informed Bach that "no exemption exists which would enable [him] to possess a handgun in New York State" and that "[t]here are no provisions for the issuance of a carry permit, temporary or otherwise, to anyone not a permanent resident of New York State nor does New York State recognize pistol permits issued by other states." The State Police further explained that persons "who maintain seasonal residen[ce] in New York State likewise are not eligible for a New York State Pistol Permit" and warned Bach that if he were found in

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[2] Because Bach's case was dismissed under Federal Rule of Civil Procedure 12(b)(6), we take the facts as set forth in the complaint. *See Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir.2004).

[3] Judging from available data, the sooner Bach reaches the New York area, the safer he will be. FBI statistics show that in 2003 the metropolitan areas surrounding and including New York City reported an average violent crime rate of 483.3 per 100,000 inhabitants, compared to rates of 487.1 per 100,000 inhabitants in the greater Washington, DC area, 609.4 per 100,000 in the greater Philadelphia area, and 883.0 per 100,000 in the greater Baltimore area. *See* FBI, CRIME IN THE UNITED STATES 95, 114, 116, 126 (2003).

possession of his pistol in New York he "would be subject to automatic forfeiture of the firearm in question and criminal prosecution."

Bach filed this action against State and local officials to contest his exclusion from New York's licensing scheme. His complaint requests that the district court declare New York's licensing laws unconstitutional, facially and as applied, in violation of both the "right to keep and bear arms" set out in the Second Amendment and the Privileges and Immunities Clause of Article IV of the United States Constitution.

Defendants moved to dismiss, and the district court granted the motion. The court concluded Bach had standing because he "ha[d] made a substantial showing that application for the permit would have been futile." *Bach v. Pataki*, 289 F.Supp.2d 217, 223 (N.D.N.Y.2003) (citing *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997)). The court held that Bach could "prove no set of facts which would entitle him to relief." *Id.* at 229 (citing *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir.1994)). Specifically, the court explained that Bach could allege no constitutional "right to bear arms" because "the Second Amendment is not a source of individual rights," *id.* at 225-26, and that New York's licensing scheme did not violate the Privileges and Immunities Clause of Article IV because "the factor of residence has a substantial and legitimate connection with the purposes of the permit scheme such that the disparate treatment of nonresidents is justifiable," *id.* at 228 (citing *People v. Perez*, 67 Misc.2d 911, 912, 325 N.Y.S.2d 183 (Onondaga County Ct.1971)). The court rejected Bach's remaining claims as meritless, *id.* at 228-29, and entered judgment for the State defendants. Bach seeks review of the dismissal of his Second Amendment and Article IV Privileges and Immunities Clause claims. We affirm.

II

A

New York State has regulated the possession of weapons since 1849. That year, the State criminalized possession of the "slung shot."[4] *See* 1849 Laws of N.Y., ch. 278, § 2, at 403-04 (repealed 1886). Thirty-five years later, New York instituted a statewide licensing requirement for minors carrying weapons in public, *see* 1884 Laws of N.Y., ch. 46, § 8, at 47,[5] and soon after the turn of the century, the State expanded its licensing requirements to include all persons carrying concealed pistols, *see* 1905 Laws of N.Y., ch. 92, § 2, at 129-30. With the passage of the Sullivan Act in the spring of 1911, New York's licensing requirement applied to all persons possessing pistols or any other firearm small enough to be carried concealed. *See* 1911 Laws of N.Y., ch. 195, § 1, at 443 (codifying N.Y. Penal Law § 1897, ¶ 3).

The State's earliest firearms-licensing statutes delegated licensing to municipalities. *See, e.g.*, 1884 Laws of N.Y., ch. 46, § 8; 1905 Laws of N.Y., ch. 92, § 2, at 242-43; 1908 Laws of N.Y., ch. 93, § 1. When the State first established statewide application requirements, it limited licenses to "have and carry concealed" to those "citizen[s] of and usually a resident in the state of New York," but permitted the licensing official – judges in most parts of the State, but the police commissioner in New York City – to make an exception, so long as the officer received certificates of good moral character regarding the applicant and

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[4] In late 1840's America, the term "slung shot" – slung being the past participle of sling – described a "shot, piece of metal, stone, etc., fastened to a strap or thong, and used as a weapon." OXFORD ENGLISH DICTIONARY 759 (2d ed.1989).

[5] The 1884 law amended section 410 of the Penal Code to provide, in part, "[A]ny person under the age of eighteen years who shall have, carry or have in his possession in any public street, highway or place in any city of this state, without a written license from a police magistrate of such city, any pistol or other fire-arm of any kind, shall be guilty of a misdemeanor."

the official "state[d] in such license the particular reason for the issuance thereof." *See* N.Y. Penal Code § 1897(9) (1927).

In 1963, New York altered its statewide licensing procedures, making two significant and related changes. First, it granted licensing officers the authority to revoke licenses "at any time." *See* 1963 Laws of N.Y., ch. 136, § 8 (codifying N.Y. Penal Code § 1903(11), now § 400.00(11)). Second, it limited carry licensees to New York residents and in-state employees. *Id.* (codifying N.Y. Penal Code § 1903(3), now § 400.00(3)). As explained below, the licensing officers' revocation authority and the residency requirement remain features of the current statutory regime.

B

Today, New York regulates handguns primarily though Articles 265 and 400 of the Penal Law. Article 265 creates a general ban on handgun possession, *see, e.g.*, N.Y. Penal Law §§ 265.01(1), 265.02(4), with specific exemptions thereto, *see* N.Y. Penal Law § 265.20. The exemption at issue here is a licensed use exemption defined in Article 400: "[the p]ossession of a pistol or revolver by a person to whom a license therefor has been issued." N.Y. Penal Law §§ 265.20(3) (referencing sections 400.00 and 400.01).

Article 400 of the Penal Law "is the exclusive statutory mechanism for the licensing of firearms in New York State." *O'Connor v. Scarpino*, 83 N.Y.2d 919, 920, 615 N.Y.S.2d 305, 638 N.E.2d 950 (1994). Licenses are limited to persons over twenty-one, of good moral character, without a history of crime or mental illness, and "concerning whom no good cause exists for the denial of the license." N.Y. Penal Law § 400.00(1). There are several types of pistol and revolver licenses, including licenses for household possession, *see* N.Y. Penal Law § 400.00(2)(a), for workplace possession, *see* N.Y. Penal Law § 400.00(2)(b), and to "have and carry concealed," *see* N.Y. Penal Law

§ 400.00(2)(f). The last, a carry license, may issue only for "proper cause."[6] *Id.*

Licensing is a rigorous and principally local process that begins with the submission of a signed and verified application to a local licensing officer. *See* N.Y. Penal Law § 400.00(3). Applicants must demonstrate compliance with certain statutory eligibility requirements as well as any facts "as may be required to show the good character, competency and integrity of each person or individual signing the application." N.Y. Penal Law § 400.00(3). Every application triggers a local investigation. *See* N.Y. Penal Law § 400.00(4). "[T]he police authority of the city or county where the application is made is responsible for investigating the statements in the application." 1986 N.Y. Op. Atty. Gen. (Inf.) 120, 1986 N.Y. AG LEXIS 26, at *1-*2. Local police, therefore, investigate applicants' mental health history, criminal history, moral character, and, in the case of a carry license, representations of proper cause. *See* N.Y. Penal Law § 400.00(1)-(4). Police officers also take applicants' fingerprints and check them against the records of the State Division of Criminal Justice Services and the FBI. *See* N.Y. Penal Law § 400.00(4). Upon completion of the investigation, the police authority reports its results to the licensing officer. *See id.*

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[6] New York requires a carry license for the concealed and open carrying of firearms. *See* N.Y. Penal Law §§ 265.01, 265.02, 400.00(2)(d)-(f). This general approach to the concealed and open carrying of firearms is distinct from that of some other States, which have laws specifically addressing the carrying of concealed firearms. *See, e.g.*, Cal. Penal Code § 12025 (defining crime of "carrying a concealed firearm" and explaining that "[f]irearms carried openly in belt holsters are not concealed"); Va. Code Ann. § 18.2-308(A) (defining crime of "carr[ying] about [one's] person, hidden from common observation, . . . any pistol"); *see also* N.Y. Joint Legislative Comm. on Firearms & Ammunition, N.Y. Legislative Doc. No. 29 at 13 (N.Y.1962) ("[T]he historic factor of whether the firearm is carried openly or concealed has frequently been decisive. Apparently in only nine (Conn., D.C., Hawaii, Ind., Mass., N.M., N.Y., Tex., W.Va.) of the forty-five prohibiting jurisdictions does the prohibition extend to openly carried firearms.").

Local licensing officers, often local judges,[7] have considerable discretion in deciding whether to grant a license application. *See, e.g., Vale v. Eidens*, 290 A.D.2d 612, 735 N.Y.S.2d 650 (3d Dep't 2002); *Kaplan v. Bratton*, 249 A.D.2d 199, 673 N.Y.S.2d 66 (1st Dep't 1998); *Fromson v. Nelson*, 178 A.D.2d 479, 577 N.Y.S.2d 417 (2d Dep't 1991); *Marlow v. Buckley*, 105 A.D.2d 1160, 482 N.Y.S.2d 183 (4th Dep't 1984). The officer may deny an application for any "good cause," *see* N.Y. Penal Law § 400.00(1)(g); *Bando v. Sullivan*, 290 A.D.2d 691, 691-92, 735 N.Y.S.2d 660 (3d Dep't 2002), may deny a carry license for an absence of what the officer deems "proper cause," *see* N.Y. Penal Law § 400.00(2)(f),[8] and may restrict a carry license "to the purposes that justified the issuance," *O'Connor*, 83 N.Y.2d at 921, 615 N.Y.S.2d 305, 638 N.E.2d 950. Licensing officers can deny applications where they find an applicant's personal background troubling. *See, e.g., Vale*, 290 A.D.2d at 613, 735 N.Y.S.2d 650; *Fromson*, 178 A.D.2d at 479, 577

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[7] "'Licensing officer' means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance." N.Y. Penal Law § 265.00(10).

[8] Licensing officers have great discretion in defining a "proper cause" threshold. For instance, the New York Court of Appeals left undisturbed a licensing officer's conclusion that good moral character plus a desire to carry a weapon would not alone establish "proper cause." *See Moore v. Gallup*, 293 N.Y. 846, 59 N.E.2d 439 (1944) (per curiam), *aff'g* 267 A.D. 64, 66, 45 N.Y.S.2d 63 (3d Dep't 1943) (upholding licensing officer's determination that "a dangerous and unwise precedent would be established if all citizens of good moral character were to be licensed to carry pistols upon a simple showing of a desire . . . to engage in unregulated and unsupervised target practice"). In New York City, "the mere fact that an applicant has been the victim of a crime or resides in or is employed in a 'high crime area,' does not establish 'proper cause' for the issuance of a carry . . . license." 38 New York City Rules and Regulations § 5-03 (example); *see Theurer v. Safir*, 254 A.D.2d 89, 90, 680 N.Y.S.2d 87 (1st Dep't 1998).

N.Y.S.2d 417. A licensing officer may also deny a carry license for lack of "proper cause" if, *inter alia*, the applicant does not "sufficiently demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Williams v. Bratton*, 238 A.D.2d 269, 270, 656 N.Y.S.2d 626 (1st Dep't 1997) (quoting *Klenosky v. New York City Police Dep't*, 75 A.D.2d 793, 428 N.Y.S.2d 256 (1st Dep't 1980), *aff'd* 53 N.Y.2d 685, 439 N.Y.S.2d 108, 421 N.E.2d 503 (1981)); *see also Bando*, 290 A.D.2d at 693, 735 N.Y.S.2d 660. A licensing officer's decision will not be disturbed unless it is arbitrary and capricious. *See O'Brien v. Keegan*, 87 N.Y.2d 436, 439-40, 639 N.Y.S.2d 1004, 663 N.E.2d 316 (1996); *see also Bando*, 290 A.D.2d. at 692, 735 N.Y.S.2d 660.[9]

A licensing officer is also "statutorily invested with the power to *sua sponte* revoke or cancel a license." *O'Brien*, 87 N.Y.2d at 439, 639 N.Y.S.2d 1004, 663 N.E.2d 316 (1996) (citing N.Y. Penal Law § 400.00(11)).[10] He enjoys wide discretion in exercising this "extraordinary power," *O'Brien*, 87 N.Y.2d at 439, 639 N.Y.S.2d 1004, 663 N.E.2d 316; *see, e.g., Gerard v. Czajka*, 307 A.D.2d 633, 762 N.Y.S.2d 533 (3d Dep't 2003); *Biganini v. Gallagher*, 293 A.D.2d 603, 742 N.Y.S.2d 73 (2d Dep't 2002), which may be exercised at "any time," N.Y. Penal Law § 400.00(11), and includes the prerogative "to monitor carry licenses he

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[9] Licensing officers exercise such great discretion in denying carry licenses that one commentator has argued that the licensing system might violate the New York State Constitution. *See* Suzanne Novak, *Why The New York State System For Obtaining A License To Carry A Concealed Weapon Is Unconstitutional*, 26 FORDHAM URB. L.J. 121, 165-66 (1998) (arguing that "[t]he sole 'proper cause' standard for the issuance of a carry license is the equivalent of a standardless delegation, which, in effect, grants . . . officials the discretion to apply their own public policy on gun control").

[10] "Other than in New York City and Nassau and Suffolk Counties, a Judge or Justice of a court of record acts as the licensing officer" for revocation purposes pursuant to section 400.00(11). *O'Brien*, 87 N.Y.2d at 439, 639 N.Y.S.2d 1004, 663 N.E.2d 316.

has issued to ensure that the basis for issuance of the license remains," 1991 N.Y. Op. Atty. Gen. (Inf.) 72, 1991 N.Y. AG LEXIS 84, *3.

An officer's revocation decision may be triggered by local incidents;[11] in light of the highly destructive potential of a firearm, local officials may revoke a license if a licensee engages in behavior that portends of future problems. Thus, where a licensee told fellow graduate students that he was "one step away from Smith & Wesson time," *Gerard*, 307 A.D.2d at 633, 762 N.Y.S.2d 533, the local police department's report of the incident caused the licensing officer to revoke the license, *id.* at 633-34, 762 N.Y.S.2d 533. In another instance, a licensing officer revoked a license after local law enforcement reported that the licensee had appeared in an "agitated state while in possession of a loaded pistol when the officer responded to a report of poachers on [the licensee's] property." *Finley v. Nicandri*, 272 A.D.2d 831, 831, 708 N.Y.S.2d 190 (3d Dep't 2000).[12] Local incidents may also lead a licensing officer to conclude that a licensee lacks the mental fitness to continue to possess a firearm and to revoke the license on that basis. *See Harris v. Codd*, 57 A.D.2d 778, 394 N.Y.S.2d 210 (1st Dep't 1977).

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[11] New York law provides for the transfer of a licensee's records to any new place of residence within the State. *See* N.Y. Penal Law § 400.00(5); *see also* 1978 N.Y. Op. Atty. Gen. (Inf.) 83, 1978 N.Y. AG LEXIS 199 (concluding that original records, not copies, should be transferred).

[12] Likewise, Paul Lang had his license revoked where he "showed poor judgment by failing to safeguard his weapon while accompanying a Boy Scout troop," *Lang v. Rozzi*, 205 A.D.2d 783, 783, 614 N.Y.S.2d 41 (2d Dep't 1994), Abraham Ehrlich's license was revoked after carrying his pistol in a social setting while intoxicated, *see In re Ehrlich*, 99 A.D.2d 545, 545, 471 N.Y.S.2d 628 (2d Dep't 1984), and Mikhail Zalmanov lost his license after failing to safeguard his gun, carrying it with him after work while socializing, and displaying it in a threatening manner, *see Zalmanov v. Bratton*, 240 A.D.2d 173, 173, 657 N.Y.S.2d 691 (1st Dep't 1997).

Licensing is thus a locally controlled process. The only nonresidents eligible for a license are local workers, who may apply to the licensing officer in the city or county of their principal employment or principal place of business. *See* N.Y. Penal Law § 400.00(3)(a). Section 400.00(3)(a) provides:

> Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper . . . .

Id. The statute does not provide a mechanism for any other nonresident applications. One New York appellate court has explained that nonresident applications would be inconsistent with "the purposes underlying the pistol permit procedures, namely, to insure that only persons of acceptable background and character are permitted to carry handguns and to provide a method for reporting information on the identity of persons possessing weapons and the weapons themselves . . . ." *Mahoney v. Lewis*, 199 A.D.2d 734, 735, 605 N.Y.S.2d 168 (3d Dep't 1993). Nonresidents without in-state employment are completely excluded from the license-application procedure.[13]

Some classes of nonresidents may nonetheless possess or carry handguns in New York. Although New York generally "does not recognize or give effect to licenses to carry firearms issued by . . . other state[s]," 1997 N.Y. Op. Atty. Gen. 14, federal law grants a limited right to transport unloaded firearms through the State.[14] Additionally,

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[13] New York courts have limited resident applications to persons who are New York domiciliaries. *See id.* (rejecting application of a New York property owner with his principal residence in Toms River, New Jersey); *cf. In re Davies*, 133 Misc.2d 38, 41, 506 N.Y.S.2d 626 (Oswego County Ct.1986) (limiting application to locality "where the applicant maintains his or her permanent or principal home").

[14] 18 U.S.C. § 926A provides: "Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivi-

Article 265 sets forth a number of provisions permitting nonresidents to possess or carry firearms. For instance, police officers of other States may possess pistols while conducting official business in New York, *see* N.Y. Penal Law § 265.20(a)(11), and nonresidents licensed within their own States may use pistols in competitive shooting matches in New York, *see* N.Y. Penal Law § 265.20(a)(13). These exemptions exist apart from the licensing exemption.

III

Bach never applied for a New York handgun license, and, before the district court, defendants contended that Bach's claims were not justiciable because Bach accordingly lacked "standing"[15] *See Bach*, 289 F.Supp.2d at 223. The district court rejected this argument. *See id.* Defendants do not renew that challenge on appeal, but, as it concerns the subject matter jurisdiction of the district court, we consider it in any event. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *see also Pashaian v. Eccelston Props.*,

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sion thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: *Provided*, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console."

[15] Defendants' "standing" objection might also be understood as a ripeness challenge. *See Brennan v. Nassau County*, 352 F.3d 60, 65 (2d Cir.2003); *Berger v. Heckler*, 771 F.2d 1556, 1562 n. 8 (2d Cir.1985); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (4th ed.) § 2.4, at 114 ("[S]tanding focuses on whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether that injury has occurred yet.").

Ltd., 88 F.3d 77, 82 (2d Cir.1996); *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1175 (2d Cir.1995). We hold that Bach's failure to file a license application does not pose an obstacle to consideration of his claims.

The district court correctly noted that "'[i]n many cases, requiring litigants to actually apply for a license before challenging a licensing scheme prevent[s] courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . .'" *Bach*, 289 F.Supp.2d at 223 (quoting *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir.1995)); *see also Prayze FM v. FCC*, 214 F.3d 245, 251 (2d Cir.2000). The district court concluded that imposing an application requirement here, however, "would serve no purpose." *Bach*, 289 F.Supp.2d at 223 (quoting *Sammon*, 66 F.3d at 643). We agree.

The State Police informed Bach that he was statutorily ineligible for a carry license.[16] Bach had nothing to gain thereafter by completing and filing an application. *See Desiderio v. NASD*, 191 F.3d 198, 202 (2d Cir.1999). New York law provides only for application to the licensing officer "where the applicant resides, is principally employed, or has his principal place of business," *see* N.Y. Penal Law § 400.00(3)(a); Bach is neither a New York resident nor worker. Imposing a filing requirement would force Bach to complete an application for which he is statutorily ineligible and to file it with an officer without authority to review it. "We will not require such a futile gesture as a prerequisite for adjudication in federal court." *Williams v. Lambert*, 46 F.3d 1275, 1280 (2d Cir.1995); *see also Sammon*, 66 F.3d at 643. Bach's claims are thus justiciable.

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[16] The Office of the Attorney General of the State of New York directed Bach to contact the State Police with his inquiry. Bach also contacted the Ulster County Sheriff's Office, and Undersheriff George A. Wood informed him that he would not fit into the exemption for "[p]ersons in the military or other service of the United States, in pursuit of official duty or when duly authorized by federal law, regulation or order to possess the same." N.Y. Penal Law § 265.20(1)(d).

IV

Bach argues that New York's licensing scheme unreasonably infringes upon his "right to keep and bear arms" under the Second Amendment, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. He contends that the Second Amendment's right to keep and bear arms is a right of individual citizens, that it limits the States in regulating firearms, and that New York's statutory scheme cannot withstand the resultant heightened scrutiny.

Bach focuses primarily on the question of whether the right to keep and bear arms is an individual right.[17] Applying textualist and originalist approaches to interpreting the Amendment, proffering historical and contemporary scholarship, and buttressed by the recent conclusions of both the Fifth Circuit and the Department of Justice, Bach asks this Court to declare the "right to keep and bear arms" an individual, rather than collective, right.[18] Defendants, by contrast, construe the Amendment as merely a "guarantee[] to the states [of] the collective right to arm or fortify their respective 'well regulated' militias" and insist that the Amendment "does not establish an individual right to 'bear arms' for any purpose." They respond to Bach's arguments in kind, offering their own textualist

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[17] For a review of various contemporary approaches to this question, see Michael Busch, *Is the Second Amendment an Individual or Collective Right: United States v. Emerson's Revolutionary Interpretation of the Right to Bear Arms*, 77 St. John's L. Rev. 345 (2003).

[18] Bach cites scholarship ranging from THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (Andrew C. McLaughlin ed., 1898) (1880) to Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998). His position reflects the opinion of the Fifth Circuit dicta in *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir.2001), and of the Department of Justice's Office of Legal Counsel in its opinion, Whether the Second Amendment Secures an Individual Right, Op. Off. Legal Counsel, 2004 WL 2930974.

and originalist analyses, relying on their own set of Second Amendment scholarship, and citing decisions of our sister circuits rejecting the individual rights interpretation.[19] The district court found the defendants' arguments more persuasive and concluded that Bach had "not alleged an infringement of any Second Amendment right" because "the Second Amendment is not a source of individual rights." *Bach*, 289 F.Supp.2d at 226.

Although the sweep of the Second Amendment has become the focus of a national legal dialogue, we see no need to enter into that debate.[20] Instead, we hold that the Second Amendment's "right to keep and bear arms" imposes a limitation on only federal, not state, legislative efforts.[21] We thus join five of our sister circuits.[22]

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[19] Defendants' citations include Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 Chi.-Kent L. Rev. 103 (2000), and Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 Chi.-Kent L. Rev. 195 (2000). Various circuit courts share defendants' conclusion. *See, e.g., Nordyke v. King*, 319 F.3d 1185, 1191-92 & n. 4 (9th Cir.2003); *United States v. Parker*, 362 F.3d 1279, 1282 (10th Cir.2004).

[20] *Cf. Emerson*, 270 F.3d at 272 (Parker, J., concurring) ("The determination whether rights bestowed by the Second Amendment are collective or individual is entirely unnecessary to resolve this case and has no bearing on the judgment we dictate by this opinion.").

[21] The district court recognized that defendants raised this argument, but it declined to address it. *Bach*, 289 F.Supp.2d at 225, n. 4.

[22] *See Thomas v. Members of the City Council of Portland*, 730 F.2d 41, 42 (1st Cir.1984) (per curiam); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir.1942) ("[T]he only function of the Second Amendment [is] to prevent the federal government and the federal government only from infringing that right."); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir.1995) ("The Second Amendment does not apply to the states."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 232 (4th Cir.1999) ("[T]he law is settled in our circuit that the Second Amendment does not apply to the States."); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n. 18 (6th Cir.1998) ("The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment; hence, the restrictions of the Second Amendment operate only upon the Federal Government."); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir.1982) ("[T]he sec-

Our holding is compelled by the Supreme Court's opinion in *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886). In 1879, Herman Presser led four hundred armed members of a society called the *Lehr und Wehr Verein* through the streets of Chicago. *Id.* at 253-55, 6 S.Ct. 580. Illinois's Military Code required that any "parade with arms" be licensed by the Governor. *Id.* Presser

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ond amendment does not apply to the states."); *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 731 (9th Cir.1992) ("[T]he Second Amendment limits only federal action, and we affirm the district court's decision 'that the Second Amendment stays the hand of the National Government only.'"); *see also Hamilton v. Accu-tek*, 935 F.Supp. 1307, 1318 (E.D.N.Y.1996) ("[T]he Second Amendment limits only the power of Congress."). *Cf. United States v. Tot*, 131 F.2d 261, 266 (3d Cir.1942) ("It is abundantly clear . . . that this amendment [was adopted] . . . as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power."), *rev'd on other grounds*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); *Eckert v. City of Philadelphia*, 477 F.2d 610, 610 (3d Cir.1973) (per curiam); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir.1988); *United States v. Parker*, 362 F.3d 1279 (10th Cir.2004). *But see United States v. Emerson*, 270 F.3d 203, 221 n. 13 (5th Cir.2001).

The New York courts also share our conclusion. They have repeatedly held that the Second Amendment is inapplicable to the State's regulation of handguns. *See Moore v. Gallup*, 293 N.Y. 846, 59 N.E.2d 439 (1944) (per curiam), *aff'g*, 267 A.D. 64, 67, 45 N.Y.S.2d 63 (3d Dep't 1943) ("Obviously, petitioner cannot rest his case upon the Second Amendment which is a limitation upon the exertion of the power of Congress and the national government, but not upon that of the State."); *Demyan v. Monroe*, 108 A.D.2d 1004, 1005, 485 N.Y.S.2d 152 (3d Dep't 1985) ("The constitutional argument, namely, that Penal Law § 400.00 infringes on petitioner's rights guaranteed by the U.S. Constitution, 2d Amendment to keep and bear arms, has already received considerable judicial attention and has consistently been repudiated."); *People ex rel. Darling v. Warden of the City Prison of New York*, 154 A.D. 413, 419-20, 139 N.Y.S. 277 (1st Dep't 1913) (citing *People v. Persce*, 204 N.Y. 397, 403, 97 N.E. 877 (1912) ("The provision in the Constitution of the United States that 'the right of the people to keep and bear arms shall not be infringed' is not designed to control legislation by the State."). *Cf. Brown v. City of Chicago*, 42 Ill.2d 501, 504, 250 N.E.2d 129, 131 (1969) ("[R]egulation which does not impair the maintenance of the State's active, organized militia is not in violation of either the terms or the purposes of the second amendment.")

lacked a license, and was charged and convicted under the Code. *Id.* Presser argued to the Supreme Court that Illinois had exercised a power "forbidden to the States by the Constitution of the United States." *Id.* at 260, 6 S.Ct. 580. He relied on both the Second and Fourteenth Amendments. *See id.* at 257, 260-61, 6 S.Ct. 580.

The Supreme Court rejected Presser's argument. Justice Woods explained, "[A] conclusive answer to the contention that [the Second Amendment] prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States." *Id.* at 265, 6 S.Ct. 580. The Court quoted Chief Justice Waite's opinion in *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875). "[T]he right of the people to keep and bear arms 'is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that is [*sic*] shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress.'" *Presser*, 116 U.S. at 265, 6 S.Ct. 580 (quoting *Cruikshank*, 92 U.S. at 553).[23] The Court affirmed Presser's conviction. *Id.* at 269.

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[23] The *Presser* court extended *Cruikshank* in an important way. In *Cruikshank*, the Supreme Court considered whether section six of the Enforcement Act, 16 Stat. 140, 141 (1870), prohibited individuals from conspiring to prevent the exercise of the "right to keep and bear arms for a lawful purpose." 92 U.S. at 545-49, 553. Section six applied, by its terms, to persons conspiring "to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." 16 Stat. at 141; *see Cruikshank*, 92 U.S. at 548. The Court found that the right to bear arms was "not a right granted by the Constitution" or "in any manner dependent upon that instrument for its existence," *id.* at 553, and, with regard to the Second Amendment explained, "This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes . . . ," *id.* at 553. The *Cruikshank* court thus held that section six of the

Presser stands for the proposition that the right of the people to keep and bear arms, whatever else its nature, is a right only against the federal government, not against the States. The courts are uniform in this interpretation. *See, e.g., Thomas*, 730 F.2d at 42 (1st Cir.); *Peoples Rights Org.*, 152 F.3d at 538-39 n. 18 (6th Cir.); *Quilici*, 695 F.2d at 269 (7th Cir.); *Fresno Rifle & Pistol Club*, 965 F.2d at 730-31 (9th Cir.). Just as Presser had no federal constitutional right "to keep and bear arms" with which to challenge Illinois's license requirement, Bach has none to assert against New York's regulatory scheme. Under *Presser*, the right to keep and bear arms is not a limitation on the power of States.

Bach does not distinguish *Presser*. Rather, he contends that Presser is "outdated" and "do[es] not reflect the Court's modern view." He relies on two footnotes for support – the Fifth Circuit's comment in *United States v. Emerson* that *Presser* "came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment," 270 F.3d at 221 n. 13, and the Ninth Circuit's similar note in *Silveira v. Lockyer* that "*Presser* rest[s] on a principle that is now thoroughly discredited," 312 F.3d 1052, 1066 n. 17 (9th Cir.2002). Bach contends that *Presser* should not and cannot bind our determination of whether the Second Amendment applies to the States. We disagree.

We must follow *Presser*. Where, as here, a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the

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Enforcement Act could not criminalize conspiracies interfering with any "right to bear arms." *Id.* at 553. In so doing, the *Cruikshank* court held that it was improper to apply any limitations of the Second Amendment, whatever those might be, against individuals. *Id.* Presser, using the language of *Cruikshank*, went further: it refused to apply any limitations of the Second Amendment against the States.

prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *see also id.* at 486, 109 S.Ct. 1917 (Stevens, J., dissenting). The Court has cautioned, in the context of constitutional interpretation, that "courts should [not] conclude [that] more recent [Supreme Court] cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *see also id.* at 258, 117 S.Ct. 1997 (Ginsburg, J., dissenting). Even if a Supreme Court precedent was "'unsound when decided'" and even if it over time becomes so "'inconsistent with later decisions'" as to stand upon "'increasingly wobbly, moth-eaten foundations,'" it remains the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 9, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir.1996) (Posner, J.)). Thus, "regardless of whether appellant[] agree[s] with the *Presser* analysis, it is the law of the land and we are bound by it. The[] assertion that *Presser* is illogical is a policy matter for the Supreme Court to address." *Quilici*, 695 F.2d at 270. We cannot overrule the Supreme Court.[24]

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[24] Bach cites this Court's incorporation of the Third Amendment in *Engblom v. Carey*, 677 F.2d 957 (2d Cir.1982), as support for the proposition that this Court may incorporate rights against the States without waiting for a "Supreme Court decision explicitly" doing so. *Engblom* is not relevant to the question before us, which is not whether this Court can incorporate rights in the absence of a Supreme Court precedent doing so – our precedents in *Engblom* and *United States v. Wilkins*, 348 F.2d 844 (2d Cir.1965), suggest that we can – but, rather, whether this Court can overrule the Supreme Court. The Supreme Court answered that question in the negative in *Shearson/American Express* and *Agostini*.

Notably, in *Wilkins*, this Court incorporated the Double Jeopardy Clause over a dissent that complained that "the incorporation of guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment at the expense of departing from several long-standing Supreme Court decisions is a step which should only be taken by that Court." 348 F.2d at 868 (Metzner, J., dissenting). *Wilkins*,

Accordingly, we hold that the "right to keep and bear arms" does not apply against the States and affirm the district court's dismissal of Bach's Second Amendment claim.

V

Bach also challenges New York's licensing regime under the Privileges and Immunities Clause of Article IV, section two of the Constitution. He contends that "New York's prohibition on allowing nonresidents such as Bach to obtain a firearms-license violates the Privileges and Immunities Clause."

Bach suggests that New York's licensing scheme unconstitutionally discriminates against both his protected rights under the Privileges and Immunities Clause and the "right to travel" secured therein. But the "right to travel," at least in this context, is simply a shorthand for the protections of the Privileges and Immunities Clause of Article IV, as travel – movement from one State to another – is at the core of every Privileges and Immunities Clause challenge. As the Supreme Court has explained, the "right to travel," in the constitutional context, "embraces at least three different components." *Saenz v. Roe*, 526 U.S. 489, 500, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999). Two of those components, "'the right of free ingress and regress to and from' neighboring states," *id.* at 500-01, 119 S.Ct. 1518 (quoting *United States v. Guest*, 383 U.S. 745, 758, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966)), and "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State," *id.* at 502-04, 119 S.Ct. 1518, are inapplicable here. The third

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however, came two decades before the Supreme Court's "firm instruction" in *Shearson/American Express*. *Agostini*, 521 U.S. at 258, 117 S.Ct. 1997 (Ginsburg, J., dissenting). As Justice Ginsburg explained, before *Shearson/American Express*, "lower courts sometimes inquired whether an earlier ruling of th[e Supreme] Court had been eroded to the point that it was no longer good law." *Id.* "*Shearson/American Express* now controls, however, so . . . [this Court has] no choice" but to follow *Presser*. *Id.*

and only relevant component is merely a restatement of rights arising under Article IV – "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in [a] second State." *Id.* at 501, 119 S.Ct. 1518. Bach's appeal depends on only this last guarantee that, "by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." *Id.* at 501, 119 S.Ct. 1518. His appeal thus condenses to the challenge that New York's handgun licensing scheme unconstitutionally discriminates against nonresidents with regard to a protected privilege under the Clause.

Because we hold that New York's interest in monitoring gun licensees is substantial and that New York's restriction of licenses to residents and persons working primarily within the State is sufficiently related to this interest, we reject Bach's Article IV Privileges and Immunities Clause challenge.

A

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. This clause, like the Commerce Clause of Article I, section 8, derives from the fourth of the Articles of Confederation,[25] *see Austin v. New Hampshire*,

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[25] That article provided, "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as to the inhabitants thereof respectively." *Austin v. New Hampshire*, 420 U.S. 656, 660, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975). "[This] provision was carried over into the comity article [Article IV] of the Constitution in briefer form but with no change of substance or intent, unless it was

420 U.S. 656, 660-61, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975); *Hicklin v. Orbeck*, 437 U.S. 518, 531-32, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 94 (2d Cir.2003), and had the primary purpose of "fus[ing] into one Nation a collection of independent, sovereign States," *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988). "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer*, 334 U.S. at 395, 68 S.Ct. 1156. It operates to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L.Ed. 357 (1869), *quoted in Friedman*, 487 U.S. at 64, 108 S.Ct. 2260. Indeed, "[t]he Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism."[26] *Austin*, 420 U.S. at 662, 95 S.Ct. 1191 (footnote omitted).

In order to prevail on a Privileges and Immunities challenge, a plaintiff must demonstrate that the "State has, in fact, discriminated against out-of-staters with regard to the privileges and immunities it accords its own citizens." *Crotty*, 346 F.3d at 94. The challenged "privilege" must come within the scope of the Clause. "The Clause '. . . establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within

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to strengthen the force of the clause in fashioning a single nation." *Id.* at 661 & n. 6, 95 S.Ct. 1191.

[26] Although the Clause uses the term citizens, residency and citizenship are "essentially interchangeable" for analytical purposes. *Friedman*, 487 U.S. 59, 64, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1998); *see also Austin*, 420 U.S. at 662 n. 8, 95 S.Ct. 1191.

the jurisdiction of another are guaranteed equality of treatment.'" *Friedman*, 487 U.S. at 64, 108 S.Ct. 2260 (quoting *Austin*, 420 U.S. at 660, 95 S.Ct. 1191). Only those activities "'sufficiently basic to the livelihood of the Nation'" are protected. *Friedman*, 487 U.S. at 64, 108 S.Ct. 2260 (quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 388, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978)). Other "distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States." *Baldwin*, 436 U.S. at 383, 98 S.Ct. 1852.

Where a protected privilege or immunity is implicated, the State may defeat the challenge by showing sufficient justification for the discrimination, *i.e.*, "'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Hicklin*, 437 U.S. at 526, 98 S.Ct. 2482 (quoting *Toomer*, 334 U.S. at 398, 68 S.Ct. 1156); *see also United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208, 222, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984). A state may defend its position by demonstrating: "(a) a substantial reason for the discrimination, and (b) a reasonable relationship between the degree of discrimination exacted and the danger sought to be averted by enactment of the discriminatory statute."[27] *Crotty*, 346

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[27] The Privileges and Immunities Clause and the so-called Dormant Commerce Clause have much in common: they share a common origin, are "mutually reinforcing," *see Hicklin*, 437 U.S. at 531, 98 S.Ct. 2482, are often used to challenge the same statute, *see, e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 432-33, 20 L.Ed. 449 (1870) (Bradley, J., concurring); *Toomer*, 334 U.S. at 407-09, 68 S.Ct. 1156 (Frankfurter, J., concurring); *Crotty*, 346 F.3d at 100 n. 16; *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir.2004), and, in some instances, the jurisprudence of one may inform that of the other, *see, e.g., Hicklin*, 437 U.S. at 531-34, 98 S.Ct. 2482; *Crotty*, 346 F.3d at 98. Nonetheless, different tests govern each. A statute will survive a Privileges and Immunities analysis if a State can demonstrate a "substantial" interest that is, as variously described, "reasonably," *Toomer*, 334 U.S. at 399; *Crotty*, 346 F.3d at 94, "substantial[ly]," *Hicklin*, 437 U.S. at 527, 98 S.Ct. 2482; *United Bldg.*, 465 U.S. at 222, 104 S.Ct. 1020; *Supreme Court of New Hamp-*

F.3d at 94; *see also Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298, 118 S.Ct. 766, 139 L.Ed.2d 717 (1997). "The availability of less restrictive means is considered when evaluating the measure and degree of the relationship between the discrimination and state interest." *Crotty*, 346 F.3d at 94; *see also Friedman*, 487 U.S. at 67, 108 S.Ct. 2260; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985). This evaluation must "be conducted with due regard for the principle that States should have considerable leeway in analyzing local evils and prescribing appropriate cures." *Toomer*, 334 U.S. at 396, 68 S.Ct. 1156, *quoted in Lunding*, 522 U.S. at 298, 118 S.Ct. 766.

Insofar as a plaintiff challenges a State's discrimination against him with regard to privileges and immunities – an "as-applied" challenge – he need only demonstrate that his own "nonresidency presents [no] special threat to any of the State's interests that is not shared" by residents. *Piper*, 470 U.S. at 289, 105 S.Ct. 1272 (White, J., concurring); *see also Crotty*, 346 F.3d at 100. A facial challenge is more burdensome. *See Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir.1999). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Thus, to

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shire v. Piper, 470 U.S. 274, 284, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985), or "closely," *Friedman*, 487 U.S. at 65, 108 S.Ct. 2260, related to the discriminatory means employed. By contrast, under the Dormant Commerce Clause, "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); *see also Swedenburg*, 358 F.3d at 238 ("When a state statute, whether on its face or in effect, discriminates against interstate commerce, it is virtually per se invalid . . . .").

succeed on a facial challenge, the plaintiff must show an absence of "any circumstances under which th[e] statute avoids a constitutional reckoning with the Privileges and Immunities Clause." *Crotty*, 346 F.3d at 100 (citing *Velazquez*, 164 F.3d at 763).

B

Bach argues that New York's licensing regime discriminates against nonresidents with regard to a protected right under Article IV's Privileges and Immunities Clause without sufficient justification. Defendants do not dispute that New York's laws discriminate against nonresidents, who, unlike residents, may only apply for a license if they work principally within the State. Instead, they respond, first, that possession of a firearm is not within the ambit of the Privileges and Immunities Clause and, second, that, even if the Clause did apply, New York's pistol permit scheme would remain valid because it "is closely related to a substantial state interest in restricting firearms possession to persons of acceptable temperament and character."

1

Bach can prevail only if New York's grant of an Article 400 license should be considered a "privilege" under Article IV. Neither the Supreme Court, this Court, nor any other Court of Appeals has considered whether the Privileges and Immunities Clause protects what Bach calls "the right to self-defense through the use of a firearm." Indeed, "[m]any, if not most, [Supreme Court] cases expounding the Privileges and Immunities Clause have dealt with th[e] basic and essential activity" of pursuing "a common calling." *United Bldg.*, 465 U.S. at 219, 104 S.Ct. 1020; *see also Crotty*, 346 F.3d at 95 (collecting cases).[28] Nonetheless, the Supreme Court "has never held that the Privi-

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[28] The Supreme Court "repeatedly has found that 'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with citizens of that State.'" *Piper*, 470 U.S. at 280, 105 S.Ct. 1272 (quoting *Toomer*, 334 U.S. at 396, 68 S.Ct. 1156).

leges and Immunities Clause protects only economic interests," *Piper*, 470 U.S. at 281 & n. 11, 105 S.Ct. 1272 (stating that the noncommercial role of a lawyer falls within the Clause); *see also Doe v. Bolton*, 410 U.S. 179, 200, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (striking residency requirement in abortion statute), and Bach contends that the right to carry a handgun is one of the non-economic interests protected by the Clause.

As support, Bach is in the awkward position of relying on dicta from the Supreme Court's opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857).[29] Chief Justice Taney in *Dred Scott* suggested that an attribute of citizenship, in addition to the right to migrate from one state to another, was the right to possess arms. The Chief Justice wrote:

> [I]t cannot be believed that the large slaveholding States regarded [blacks] as included in the word

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[29] Bach also argues that *Patsone v. Pennsylvania*, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539 (1914), supports his position that the Privileges and Immunities Clause encompasses the right to carry a handgun. It does not. In *Patsone*, the Supreme Court considered an equal protection challenge to a Pennsylvania statute that discriminated against aliens by limiting their rights to own shotguns and rifles. *See id.* at 141, 143, 34 S.Ct. 281. The Court had no opportunity to consider the Privilege and Immunities Clause.

Moreover, to the extent that dicta from *Patsone* might have indicated, as Bach suggests, that the right to own a pistol is protected as a fundamental right under the Equal Protection Clause, this Circuit has rejected that position. *See United States v. Toner*, 728 F.2d 115, 128 (2d Cir.1984) ("[The] right to possess a gun is clearly not a fundamental right."); *see also Lewis v. United States*, 445 U.S. 55, 65 & n. 8, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) (reviewing firearms restrictions for a rational basis and noting, "[L]egislative restrictions on the use of firearms . . . do [not] trench upon any constitutionally protected liberties."); *United States v. Darrington*, 351 F.3d 632, 635 (5th Cir.2003); *Olympic Arms v. Buckles*, 301 F.3d 384, 388-89 (6th Cir.2002); *United States v. Hancock*, 231 F.3d 557, 565-66 (9th Cir.2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 709 (7th Cir.1999); *United States v. Synnes*, 438 F.2d 764, 771 & n. 9 (8th Cir.1971). Thus, Bach has nothing here to gain by equating protected rights under the Equal Protection Clause with the "privileges" of Article IV.

> citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, . . . and to keep and carry arms wherever they went.

Id. at 417. "The logic of Taney's argument at this point seems to be that, because it was inconceivable that the Framers could have genuinely imagined blacks having the right to possess arms, it follows that they could not have envisioned them as being citizens, since citizenship entailed that right." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651. Bach contends that "[t]his is powerful evidence of what rights the Supreme Court understood the Clause protects, although its protections wrongly were denied to an entire class of people." Defendants, by contrast, would have us view the Chief Justice's comments as inconsequential dicta, inserted "to bolster [the] holding" by "raising the specter of slave revolt."

This is not the occasion to weigh the import, if any, of Chief Justice Taney's ruminations. Because we agree with defendants and the district court that New York's licensing scheme is sufficiently justified, *see Bach*, 289 F.Supp.2d at 226-28, we will assume, without deciding, that entitlement to a New York carry license is a privilege under Article IV.

2

There is no question that New York discriminates against nonresidents in providing handgun licenses under Article 400. Defendants do not contest this fact. Instead,

they argue that the discrimination is sufficiently justified by New York's public safety interest in monitoring handgun licensees.[30] We do not doubt, and Bach does not dispute, that "[t]he State has a substantial and legitimate interest . . . in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument." *In re Pelose*, 53 A.D.2d 645, 645, 384 N.Y.S.2d 499 (2d Dep't 1976).[31]

New York's monitoring interest is, in essence, an interest in continually obtaining relevant behavioral information. The State's licensing scheme vests broad revocation discretion in a local licensing officer, permitting that officer to revoke a license on the basis of a wide variety of behavioral data, including information reported from local incidents. *See, e.g., Finley*, 272 A.D.2d 831, 708 N.Y.S.2d 190; *Harris*, 57 A.D.2d 778, 394 N.Y.S.2d 210. The operative information available to licensing officers is not restricted to the legal formalities of an arrest warrant, an accusatory instrument, or a judgment of conviction. Licensing officers have the discretion to revoke licenses upon

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[30] Defendants also argue that New York's residency requirement enables "local licensing officers to make informed decisions about the suitability of applicants." The district court credited this argument. *See Bach*, 289 F.Supp.2d. at 227. However, because we hold that New York's monitoring rationale is a sufficient justification, we do not consider New York's interest in the initial licensing determination.

[31] This interest extends to the State's ability to monitor licensees' "good character, competency and integrity," *see* N.Y. Penal Law § 400.00(3), including their mental fitness, *see Harris*, 57 A.D.2d at 778, 394 N.Y.S.2d 210, composure, *see Gerard*, 307 A.D.2d at 633, 762 N.Y.S.2d 533; *Finley*, 272 A.D.2d at 831, 708 N.Y.S.2d 190, maturity of judgment, *see Lang*, 205 A.D.2d at 783, 614 N.Y.S.2d 41; *In re Papaioannou*, 14 A.D.3d 459, 459, 788 N.Y.S.2d 378 (1st Dep't 2005), and safe or unsafe habits, *see In re Ehrlich*, 99 A.D.2d at 545, 471 N.Y.S.2d 628; *Zalmanov*, 240 A.D.2d at 173, 657 N.Y.S.2d 691. In the case of a carry licensee, it also includes the State's ability to monitor continuing "proper cause." *See* N.Y. Penal Law § 400.00(2)(f); 1991 N.Y. Op. Atty. Gen. (Inf.) 72, 1991 N.Y. A.G. LEXIS 84, at *3.

displays of "poor judgment," *see, e.g., Lang*, 205 A.D.2d at 783, 614 N.Y.S.2d 41, dangerous paranoia, *see, e.g., Harris*, 57 A.D.2d at 778, 394 N.Y.S.2d 210, or violations of permit restrictions, *see, e.g., Brookman v. Dahaher*, 234 A.D.2d 615, 615-16, 650 N.Y.S.2d 879 (3d Dep't 1996).

But the degree of discrimination exacted must be substantially related to the threatened danger. *See Crotty*, 346 F.3d at 94. This is the more difficult inquiry: with regard to New York's monitoring interest, is there any "particularized evil presented uniquely by nonresident[s] . . . that warrants the degree of outright discrimination imposed"? *Crotty*, 346 F.3d at 98. Defendants argue:

> The ongoing flow of information to a licensing officer as a result of the licensee's tie to a particular residence or community is an important element of the State's regulatory scheme. It substantially increases the likelihood that a licensing officer will be alerted to facts that cast doubt on a licensee's fitness to possess a firearm.

Appellee's Br. at 19-20. Bach challenges the substantiality of this relationship. He contends: (1) nonresidents within the State are no more difficult to monitor than residents, and (2) New York has not shown that it could not obtain the same quality of information from other States. Thus, Bach concludes, defendants have not shown any "palpable and unique risks" posed by out-of-state residents. We disagree.

First, although it may be true that New York can monitor nonresidents as easily as residents while either are in the State, New York has an interest in the entirety of a licensee's relevant behavior. Information regarding a licensee's adherence to license conditions is information that may only exist when the gun owner is in-state, but information regarding the licensee's character and fitness for a continued license is not so limited. New York has just as much of an interest, for example, in discovering signs of mental instability demonstrated in New Jersey as in discovering that instability in New York. The State can

only monitor those activities that actually take place in New York. Thus, New York can best monitor the behavior of those licensees who spend significant amounts of time in the State. By limiting applications to residents and in-state workers, New York captures this pool of persons. It would be much more difficult for New York to monitor the behavior of mere visitors like Bach, whose lives are spent elsewhere.[32]

Second, we think it self-evident that, at least in Bach's case, other States, like Virginia, cannot adequately play the part of monitor for the State of New York or provide it with a stream of behavioral information approximating what New York would gather. They do not have the incentives to do so. First, other States are not bound to impose a discretionary revocation system like New York's.[33]

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[32] Bach does not allege that he spends as much time in New York as a local resident or worker and does not argue, accordingly, that New York would have equally adequate opportunities to monitor him.

[33] Indeed, Virginia appears to have a system quite different from New York's. Whereas New York vests extraordinary discretion in licensing officers to deny or revoke licenses on the basis of "proper cause" and "good character, competency and integrity" standards, in 1995, Virginia deleted its more general "good character" standard and replaced it with specific enumerated grounds for disqualification. See Va.Code § 18.2-308; 1995 Va. Op. Atty. Gen. 130, 1995 WL 677533, at *1 (explaining change in Code from a "good character" standard to enumerated disqualification rules). Virginia's Attorney General concluded that a gun-permitting decision in the Commonwealth may be based only on the statutorily required information and that courts are "not authorize[d] . . . to require additional information for determining the advisability of granting an applicant a permit for reasons not enumerated in the statute." *Id.* at *2.

We need not determine whether a plaintiff from a State employing a system substantially similar to New York's would be able to demonstrate a non-discriminatory and adequate substitute means for New York to satisfy its interest in monitoring nonresidents. We would note, however, that the Supreme Court has stated, albeit in the context of taxes challenged under the Clause, that "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State." *Lunding*, 522 U.S. at 314, 118 S.Ct. 766 (quoting *Austin*, 420 U.S. at 668, 95 S.Ct. 1191);

Therefore, they need not engage in monitoring of licensees similar to New York's monitoring. Second, because a New York license operates only in New York, other States, like Virginia, have very little to gain from a revocation of a New York license – a revocation would affect the safety of New Yorkers, not Virginians. Obviously, New Yorkers have a much greater interest in reporting misbehavior to New York local licensing officers than do out-of-state persons and their government officers. Monitoring is incentive-driven; without these incentives, there is little reason to expect effective monitoring, if any.[34]

Moreover, Bach does not point to any adequate alternative method for New York to collect this information. Bach argues that New York can and does rely on out-of-state reporting and cites Penal Law § 400.00(11), which provides for revocation or suspension of a license upon the conviction of a felony or serious offense "anywhere." But New York's system permits license revocations for a range of misbehavior of which serious offenses and felonies form only a small part, and Bach does not point to any reason to expect Virginia or any other State to report such behavior to New York. Bach also suggests that New York could require nonresidents to submit to more frequent renewals or periodic interviews with local officials. However, New York's proffered interest is in monitoring the relevant day-to-day behavior of license-holders; it is unclear how an

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cf. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 81-82, 40 S.Ct. 228, 64 L.Ed. 460 (1920).

[34] Bach points out that New York's monitoring process involves information-sharing between counties and suggests that there is no difference between county-to-county sharing within New York and sharing between out-of-state and in-state localities. But New York counties have the two important monitoring and reporting incentives, discussed above, that out-of-state localities lack: first, counties operate under New York's revocation regime and, second, because a New York carry license may be valid throughout the State, counties internalize the effects of an unfit or dangerous licensee and have much to gain from a timely revocation.

accelerated renewal schedule or a round of interviews with local officials would supply this information.

Bach also suggests that reference letters or certifications from a nonresident's local authorities could fill New York's informational gap. Perhaps in other contexts references or similar informational requests might provide an adequate substitute source of information. For instance, when a State has an interest in monitoring the fitness of a licensed professional, references from persons involved in professional relationships with the licensee might be an adequate source of information. Or, where a State has an interest in monitoring the fitness of a licensed user of some universally-insured activity – driving an automobile, for instance – submission of updated insurance reports might prove adequate. In both examples, there may be strong arguments that another party has an equally strong incentive to monitor the licensee's relevant behavior – the professional's clients will often have a personal stake in the professional's work; the insurer will have a financial stake in the insured's risk profile. Here, however, Bach has not pointed to any monitor with a similar interest in assessing a nonresident's fitness to carry a handgun. Other States are not bound by New York's monitoring system. Thus, Bach has not shown how New York could "protect its interests through less restrictive means." *Piper*, 470 U.S. at 287, 105 S.Ct. 1272.

New York's monitoring rationale is distinct from rationales rejected in other Privileges and Immunities Clause cases. Most importantly, the monitoring rationale is not an interest of merely "general concern," to which a resident/nonresident distinction would not be tailored,[35] but, rather, actually turns on where a person spends his or her time. The exception for nonresidents working in-state

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[35] *See, e.g., Crotty*, 346 F.3d at 99; *see also Toomer*, 334 U.S. at 397-99, 68 S.Ct. 1156. *Cf. Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399.

is consistent with this criterion. The exception also further distinguishes New York's license requirements from those invalidated in *Piper* and *Friedman*. There, nonresident lawyers were denied admittance to the bar even though their primary places of business were within the licensing State. *See Piper*, 470 U.S. at 275-76, 105 S.Ct. 1272; *id.* at 288, 105 S.Ct. 1272 (White, J., concurring); *Friedman*, 487 U.S. at 61, 68-69, 108 S.Ct. 2260. Here, by contrast, nonresidents with their primary place of business in New York are eligible for an Article 400 license. *See* N.Y. Penal Law § 400.00(3)(a). New York's exception is relevant because the location of a licensee's principal employment correlates with the State's monitoring interest in a manner similar to the place of the licensee's residence – both present opportunities for the State to monitor the licensee.[36] New York's nonresident distinction, with the in-state worker exception, is thus tailored to the State's monitoring interest.

Defendants have demonstrated that "'non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Hicklin*, 437 U.S. at 526, 98 S.Ct. 2482 (quoting *Toomer*, 334 U.S. at 398, 68 S.Ct. 1156). They have "'no [more] burden to prove that [the State's] laws are not violative of the . . . Clause.'" *Id.* (quoting *Baldwin*, 436 U.S. at 402, 98 S.Ct. 1852 (Brennan, J., dissenting)). Bach's failure to prevail on his as-applied challenge renders his

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[36] It is quite possible that many other State interests, including those considered in *Piper* and *Friedman*, might not substantially correlate with domicile. The New Jersey Supreme Court, for instance, concluded that there is only a weak correlation, at best, between that State's interest in its lawyers' qualifications and a lawyer's place of domicile. *See In re Sackman*, 90 N.J. 521, 448 A.2d 1014, 1021 (1982). The New Jersey Supreme Court explained that "[t]he premise . . . that the mere fact of *living* in New Jersey makes it more likely, and more to the point, sufficiently more likely, that that lawyer will be more competent, accessible and accountable than the one who is living in another state[,] . . . [if] true, . . . is only marginally true." *Id.* Here, by contrast, the fact that a licensee lives in New York makes it sufficiently more likely that the State will be able to monitor him.

facial challenge likewise invalid. Accordingly, we affirm the district court's rejection of Bach's Privileges and Immunities Clause claim. *Cf. In re Ware*, 474 A.2d 131 (Del.Sup.Ct.1984); *Perez*, 67 Misc.2d at 911-13, 325 N.Y.S.2d 183.

VI

Theories regarding constitutional protections for the "right to keep and bear arms" have moved from the pages of law reviews to those of the Federal Reporters. Perhaps soon they will make their way into the United States Reports. Bach presents two theories of protected rights to arms – protection under the Second Amendment and the Privileges and Immunities Clause of Article IV – but this is not the case in which to decide the propriety of either. The Second Amendment cannot apply to the States in light of *Presser*, and the Privileges and Immunities Clause cannot preclude New York's residency requirement in light of the State's substantial interest in monitoring handgun licensees.

For the foregoing reasons, the district court's judgment of September 23, 2003 is hereby AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

No. 02-CV-1500

DAVID D. BACH,
Plaintiff,

v.

GEORGE PATAKI, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK, ET AL.,
Defendants.

[Filed Sept. 23, 2004]

MEMORANDUM – DECISION AND ORDER

MORDUE, District Judge.

INTRODUCTION

In this action for declaratory and permanent injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(a)(3),(4), plaintiff moves for a preliminary injunction, permanent injunction and declaratory judgment pending final judgment (Dkt. No. 2). He moves separately to consolidate the trial on the merits with a hearing on the application for a preliminary injunction (Dkt. No. 7). Defendants George E. Pataki, in his official capacity as Governor of New York, Eliot Spitzer, in his official capacity as Attorney General of New York, and James W. McMahon, in his official capacity as Superintendent, New York State Police (collectively "state defendants") cross-move to dismiss the complaint (Dkt. No 10). For reasons set forth herein, the Court denies plaintiff's motions and grants the state defendants' motion to dismiss the complaint against them.

Plaintiff, a nonresident of New York, challenges New York's statutory scheme pertaining to the issuance of permits to carry or possess concealed firearms in the state. Under the scheme, most people without significant contacts to New York are not eligible for such permits and thus are prevented from legally carrying such weapons while traveling in New York. In his initial pleading, denominated "Plaintiff's Application for Preliminary and Permanent Injunction, and Declaratory Relief,"[1] plaintiff, a domiciliary of the state of Virginia, summarizes his claim as follows:

> This Application seeks declaratory and injunctive relief to protect the substantive constitutional rights of ordinary, law-abiding, nonresident citizens of sister States to keep and bear otherwise lawful firearms while temporarily residing, visiting and traveling within the State of New York; and to protect these citizens from unlawful discrimination and criminal prosecution under State law. Bach seeks a declaratory judgment that New York's licensing provisions (as codified in N.Y. Penal Law §§ 265.00 and 400.00, et seq.), facially, and as applied, violate the fundamental personal rights, privileges and immunities of ordinary, law-abiding, nonresident citizens to keep and bear arms, and travel interstate under the Second and Fourteenth Amendments, and Article IV of the United States Constitution. In addition, Bach requests the Court to grant a preliminary injunctive order pending a determination of the merits to prevent any further irreparable harm to Bach and other ordinary nonresident citizens whose constitutional rights continue to be infringed under New York law.

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[1] Plaintiff has not served or filed a document denominated a complaint. With his summons he served and filed "Plaintiff's Application for Preliminary and Permanent Injunction, and Declaratory Relief" (Dkt. No. 1). The Court treats this document as the complaint.

In his affidavit in support of the claim, plaintiff avers:

1. I am a citizen of the United States and the State of Virginia where I maintain my domicile. I possess a permit to carry a concealed handgun in accordance with Virginia law and own a 9mm pistol (model P-85, manufactured by Sturm, Ruger and Company of Southport, Connecticut) substantially similar to the type used by the United States Armed Forces, National Guard, and law enforcement.

2. I am a Commissioned Officer in the United States Naval Reserve with approximately twenty-five years of service, including twelve years of active duty service. Due to my military service with the Navy's Underwater Demolition and SEAL Teams, I have extensive experience in handling and providing instruction in different types of small arms. I currently hold a Department of Defense Top Secret Security Clearance and have never been convicted of a felony, firearms related crime, or any other serious offense.

3. I am a graduate from an accredited law school and have been a licensed attorney in good standing from the Commonwealth of Pennsylvania since 1985. During the past seventeen years, I have been employed by the Office of the General Counsel, Department of the Navy as an attorney, except for a period of approximately four-and-a-half years when I returned to active duty as a Navy SEAL both during and after Operation DESERT STORM.

4. I have been married for seventeen years and have three young children. Although born in New Jersey, I grew up in the Town of Saugerties, County of Ulster, New York where my parents continue to reside.

5. My parents own a small farm and my family and I periodically visit them for several days at a time. During the ten-hour drive between Virginia and Upstate New York, my family and I travel on dimly lit

rural roads, busy streets and highways some of which are in densely populated areas that have extremely high crime rates. Should our vehicle breakdown in one of these areas, or should we have an accident, we would be vulnerable to criminal attack because we are required to travel unarmed. In addition, because of my occupation within the Department of Defense and Naval Special Warfare, I believe my family and I are at greater risk of being targeted by those seek [*sic*] to carry out symbolic acts of terror. Therefore, I wish to possess and carry my personal firearm to protect my family and myself from acts of criminal violence in accordance with New York State law during our journey and while temporarily visiting within the State's jurisdiction.

6. Law enforcement personnel are relatively few and far between and have neither a legal duty to respond to an emergency 911 call nor protect a citizen or family from a violent criminal acts [*sic*]. Despite the exceptional efforts of law enforcement, they cannot be everywhere at all times as evidenced by the tens of thousands of ordinary, law-abiding American citizens who have been, and continue to be brutally attacked, terrorized and murdered by sadistic criminals in New York State.

7. Following the attacks on the World Trade Center in New York, the Pentagon in Virginia, and a commercial airliner in Pennsylvania, the President and Attorney General of the United States, and Director of Homeland Security repeatedly warned American citizens of impending terrorist attacks, including the possible employment of weapons of mass destruction. Additionally, they have notified the public of the vital need for every citizen to be watchful and vigilant as the Nation remains on heightened alert indefinitely. Because the United States is in a state of war at home and abroad, and thousands of citizens have been slaughtered by foreign enemies in

New York, Virginia and Pennsylvania, I continue to maintain a heightened concern for the safety and welfare of my family, particularly when traveling interstate through unfamiliar territory.

8. As a parent, I bear ultimate responsibility for the safety, welfare, protection and defense of my children. But because New York State law prohibits me from obtaining the required license to possess and carry an operable pistol or revolver, I am unable to effectively protect and defend my family from acts of criminal violence while temporarily visiting and traveling within the State. Because attempting to use a cumbersome long-gun as a personal defense weapon is an ineffective alternative to a handgun, particularly in an automobile, I am deprived of the only rational and effective means I have to repel an attack from a violent criminal predator.

9. Due to my military training, I am aware that law enforcement routinely chooses handguns as its primary weapon of protection. When used properly, a handgun offers an extremely effective means of personal protection in close combat situations, such as stopping violent criminals.

10. Although the State of New York has deprived me of the rational and effective means to protect and defend my family, the State would be immune from liability should my family or I be harmed by criminals, even if the State were to be found grossly negligent.

11. Because of my concern for my family's protection and safety, I mailed written inquiries to Eliot Spitzer, New York State Attorney General; Sergeant James Sherman, New York State Police, Pistol Permit Bureau; and J. Richard Bockelmann, Ulster County Sheriff on November 14, 2001. My purpose in contacting these government officials was to confirm my understanding of New York law whereby an ordinary nonresident from another State who does

not meet one of the narrowly prescribed exemptions under N.Y. Penal Law § 265.20, is ineligible to obtain a New York firearms license, and thus submission of a firearms license application and nonrefundable fee would be a futile act.

12. By letter of November 27, 2001, Peter A. Drago, Director of Public Information and Correspondence, State of New York, Office of the Attorney General referred me to the New York State Police in Albany as the "appropriate authority to contact with your request."

13. By letter of December 5, 2001, Sergeant James Sherman of the New York State Police, Pistol Bureau, confirmed that "no exemption exists which would enable you to possess a handgun in New York State." Further, "[t]here are no provisions for the issuance of a carry permit, temporary or otherwise, to anyone not a permanent resident of New York State nor does New York State recognize pistol permits issued by other states." Finally, he warned that anyone "found to be in possession of a pistol or revolver that is not registered on a New York State Pistol Permit, exempt personnel excluded, would be subject to automatic forfeiture of the firearm in question and criminal prosecution."

14. By letter of December 18, 2001, Ulster County Undersheriff, George A. Wood confirmed that "[t]here are two ways in New York State to lawfully possess a pistol/revolver. First is to be licensed, as outlined in § 400.00, and the second is to meet one of the 'exceptions' outlined in § 265.20 of the NYS Penal Law." Further, he informed me that I clearly would not meet the exemption for military personnel under New York Penal Law § 265.20(1)(d) while temporarily visiting in the State despite my current military status as a Selected Naval Reservist.

15. Based on the foregoing responses regarding the State's application of New York law, I concluded

> that neither I nor other ordinary nonresidents, i.e., those not meeting any exemption under N.Y. Penal Law § 265.20, are eligible to obtain a valid New York State firearms license, and that submission of a firearms license application and nonrefundable fee would be a futile act since by law it could not be approved.

Plaintiff's causes of action assert violation of his right to keep and bear arms under the Second and Fourteenth Amendments; violation of his right under the Privileges and Immunities Clause to keep and bear lawful firearms while traveling interstate; discriminatory treatment of nonresidents of New York resulting in a denial of equal protection; deprivation of substantive due process; and deprivation of the privileges and immunities of state residents due to unlawful burdens on the rights of nonresidents to move freely in or through New York.

Under New York's statutory scheme, a person who qualifies for an exemption under N.Y. Penal Law § 265.20 is not subject to prosecution under New York's criminal statutes proscribing possession of a weapon. Grounds for exemption under section 265.20 include "[p]ossession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00" of the Penal Law. Section 400.00(3)(a) provides:

> Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located.

With respect to the statutory scheme, the state defendants explain:

> A variety of persons with significant contacts with the State, therefore, are statutorily eligible to apply

> for a permit, namely New York residents and non-residents who have their principal place of employment or principal place of business as a merchant or storekeeper in New York. The identity of the licensing officer referred to in this section depends on the locality. See N.Y. Penal Law § 265.00(10). Whether a permit is, in turn, actually granted is within the discretion of that licensing officer. Under these provisions, persons, even when granted a permit, are not provided a blanket license to carry any weapon. Instead, each license specifies in detail each weapon covered by that license and whether that license is issued as a license to carry or possess on the premises. N.Y. Penal Law § 400.00(7)[.]

(Citations omitted.)

DISCUSSION

Standing

In support of their dismissal motion, the state defendants first argue that plaintiff lacks standing to maintain the action because, as plaintiff concedes, he has not applied for a permit under section 400.00 of New York's Penal Law. "As a general rule, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy." *Prayze FM v. Federal Communications Comm'n*, 214 F.3d 245, 251 (2d Cir.2000) (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir.1997) (internal quote omitted)). "In many cases, requiring litigants to actually apply for a license before challenging a licensing scheme prevent[s] courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also . . . protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *See Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639, 643 (3d Cir.1995) (citation and internal quote omitted).

Plaintiff contends that he has standing despite his failure to apply for a permit because in his case applying for a permit would have been futile. Under well-established law, a plaintiff may be excused from the threshold standing requirement that he submit to the challenged policy if he "makes a substantial showing that application for the benefit . . . would have been futile." *Jackson-Bey*, 115 F.3d at 1096. For example, in *Sammon*, plaintiffs were excused from applying for licenses on the ground of futility where there was no indication that they could possibly obtain licenses without first meeting the challenged requirement. 66 F.3d at 643. In contrast, in *Prayze FM*, the Second Circuit held that the plaintiff had failed to demonstrate futility where the challenged requirement was subject to waiver and there was no history from which to judge how the licensing authority would handle a waiver request. 214 F.3d at 251.

Here, the Court concludes that plaintiff's failure to apply for a permit under section 400.00 of the Penal Law does not deprive him of standing. By his affidavit, plaintiff has established facts demonstrating that as a matter of law he does not qualify for a permit under section 400.00 of New York's Penal Law by its plain terms and as it has been construed by New York courts. *See, e.g., Mahoney v. Lewis*, 199 A.D.2d 734, 605 N.Y.S.2d 168 (3d Dep't 1993); *People v. Perez*, 67 Misc.2d 911, 325 N.Y.S.2d 183, 186 (1971). Defendants do not dispute plaintiff's factual allegations in this regard, nor do they seek discovery on the issue, nor do they argue that there is any factual scenario in which plaintiff, a Virginia resident who has no employment or business in New York, could possibly qualify for a permit under New York law. Moreover, in the case at bar, as distinguished from *Prayze FM*, there is nothing to suggest that the challenged residency requirement is subject to waiver or other discretionary action. *See* 214 F.3d at 251. Requiring plaintiff to apply for a permit, therefore, "would serve no purpose." *Id.* Accordingly, plaintiff has made a substantial showing that application for the per-

mit would have been futile. *See Jackson-Bey*, 115 F.3d at 1096.

Second Amendment: Individual or Collective Right?

Plaintiff contends that New York's law infringes his rights under the Second Amendment to the United States Constitution, which states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." According to plaintiff, this amendment "protects individual Americans in their rights to keep and to bear arms regardless of whether they are a member of a select militia or performing active military service or training."

Plaintiff's reading of the Second Amendment guarantee is not supported by the sparse Supreme Court guidance on the question. In *United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), the Supreme Court reversed the dismissal of an indictment charging two men with illegally transporting a shotgun having a barrel less than eighteen inches in length in violation of the National Firearms Act. The *Miller* court rejected the district court's conclusion that the Act, which regulated certain firearms including shotguns having a barrel of less than eighteen inches in length, violated the Second Amendment. In language which has been described as "somewhat cryptic," *Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir.2002), *petition for cert. filed*, 72 USLW 3093 (July 3, 2003), and "not entirely illuminating," *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir.1999), the *Miller* court stated:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any

> part of the ordinary military equipment or that its use could contribute to the common defense.

Miller is almost invariably read as demonstrating that the Supreme Court does not view the Second Amendment as safeguarding a fundamental individual right. For example, the Second Circuit, noting the concession by a criminal defendant that rational-basis review applies to his equal protection challenge to a federal firearms statute, stated:

> [Defendant's] concession . . . is clearly correct since the right to possess a gun is clearly not a fundamental right, *cf. United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) (in the absence of evidence showing that firearm has "some reasonable relationship to the preservation or efficiency of a well regulated militia," Second Amendment does not guarantee right to keep and bear such a weapon)[.]

United States v. Toner, 728 F.2d 115, 128 (2d Cir.1984)[2]; *accord Silveira*, 312 F.3d at 1066 (referring to "*Miller's* implicit rejection of the traditional individual rights position."); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.1995) ("Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective rather than an individual right."); *but see United States v. Emerson*, 270 F.3d 203, 226 (5th Cir.2001) (*Miller* does not support the collective rights approach to the Second Amendment); *also see Warin*, 530 F.2d 103, 106 (6th Cir.1976) and *Cases v. United States*, 131 F.2d 916, 922 (1st Cir.1942) (the Supreme Court did not intend to formulate a general rule in *Miller*, but merely dealt with the facts of that case).

The Supreme Court's few subsequent references to *Miller* offer little further guidance as to the Supreme

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[2] The Second Circuit's treatment of *Miller* in two unpublished decisions is consistent with that in *Toner*. *See United States v. Scanio*, 165 F.3d 15 (Table), 1998 WL 802060, *2 (2d Cir.1998); *Lawson v. Kirschner*, 152 F.3d 919 (Table), 1998 WL 433014, *2 (2d Cir.1998).

Court's view of the Second Amendment.[3] In light of the wording of *Miller*, the fact that it has never been disavowed by the Supreme Court, and the manner in which it has been construed by the Second Circuit and most other circuit courts, the Court reads *Miller* as lending support to the state defendants' position that the Second Amendment does not secure an individual right.

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[3] In *Adams v. Williams*, Justice Douglas, dissenting from a decision upholding the seizure of a weapon during a *Terry* stop, stated his opinion that the police problem arising from illegal weapons "is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol." 407 U.S. 143, 150, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). After stating that "[t]here is no reason why all pistols should not be barred to everyone except the police[,]" he continued: "The leading case is *United States v. Miller*, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence that a sawed-off shotgun had some reasonable relationship to the preservation or efficiency of a well regulated militia. The Second Amendment, it was held, must be interpreted and applied with the view of maintaining a militia." *Id.* (internal quotes and citation to *Miller* omitted).

More recently, in *Lewis v. United States*, the court rejected a challenge to a federal firearms statute prohibiting a felon from possessing a firearm even if the predicate felony may be subject to collateral attack on constitutional grounds. In a footnote, the court stated that the legislative restrictions on the use of firearms do not "trench upon any constitutionally protected liberties[,]" citing *Miller*. 445 U.S. 55, 65 n. 8, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980).

The most recent reference by the high court to *Miller* is found in *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), in which the Court struck down as violative of the Tenth Amendment the provision of the Brady Handgun Violence Prevention Act imposing on state officers the obligation to conduct background checks on prospective handgun purchasers. In his concurring opinion, Justice Thomas observed that the court had not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. He stated in a footnote: "In *Miller*, we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be ordinary military equipment that could contribute to the common defense. The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment." *Id.* at 938 n. 1, 117 S.Ct. 2365 (internal quotes and citation to *Miller* omitted).

In addition to the language in *Miller*, further support for the conclusion that the Second Amendment does not secure an individual right is found in Second Circuit authority, *see Toner*, 728 F.2d at 128 ("the right to possess a gun is clearly not a fundamental right"), and the heavy weight of authority in other circuits. *See Silveira*, 312 F.3d at 1066 (9th Cir.) ("[T]he Second Amendment does not provide an individual right to own or possess guns or other firearms[.]"); *United States v. Graham*, 305 F.3d 1094, 1106 (10th Cir.2002), *cert. denied*, 537 U.S. 1142, 123 S.Ct. 939, 154 L.Ed.2d 840 (2003) (the right to bear arms is a collective rather than an individual right); *Love*, 47 F.3d at 124 (4th Cir.) ("[T]he amendment does not confer an absolute individual right to bear any type of firearm."); *Warin*, 530 F.2d at 106 (6th Cir.) ("It is clear that the Second Amendment guarantees a collective rather than an individual right."); *Dew v. United States*, 1998 WL 159060, *6 (S.D.N.Y.1998), *aff'd on other grounds*, 192 F.3d 366 (2d Cir.1999) ("It is settled constitutional law that the Second Amendment is not a source of individual rights."); *Hamilton v. Accu-tek*, 935 F.Supp. 1307, 1318 (E.D.N.Y.1996) (same); *but see Emerson*, 270 F.3d at 260 (5th Cir.) (the Second Amendment "protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons[.]").

In view of the weight of authority, including the present state of Supreme Court and Second Circuit jurisprudence, the Court adopts the view that the Second Amendment is not a source of individual rights. Accordingly, plaintiff has not alleged an infringement of any Second Amendment right.[4]

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[4] Also in support of their motion to dismiss the complaint, the state defendants argue that the Second Amendment does not enjoin state action, another issue which is not free from doubt. In arguing that the Second Amendment is not incorporated by the Fourteenth Amendment

Right to Travel

Plaintiff also urges that New York's permit scheme infringes his right to travel. "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). One component of the right to travel is the right of a nonresident of a state "to be treated as a welcome visitor rather than an unfriendly alien when temporarily present" in that state. *Saenz v. Roe*, 526 U.S. 489, 500, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999). This right is protected by the Privileges and Immunities Clause of Article IV of the United States Constitution, which guarantees that a citizen of one state who travels temporarily in another state is entitled to enjoy the privileges and immunities of the citizens of the state that

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and thus does not constrain actions by the states, the state defendants rely primarily on *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1875) (stating that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the National Government.") and *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886) (reaffirming *Cruikshank*). Circuit courts have recently cited these two cases for the proposition that the Second Amendment does not apply to the states. *See Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 538 n. 18 (6th Cir.1998); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir.1995). The Fifth Circuit in *Emerson*, however, states with respect to *Cruikshank* and its progeny: "As these holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us." 270 F.3d at 221 n. 13; *accord Silveira*, 312 F.3d at 1067 n. 17 (stating that *Cruikshank* and *Presser* "rest on a principle that is now thoroughly discredited."). Neither the Fifth nor the Ninth Circuit, however, takes a position as to the present-day status of the question of whether the Second Amendment binds the states. In view of this Court's holding that the Second Amendment is not a source of individual rights and that therefore plaintiff has not alleged an infringement of a right protected by the Second Amendment, the Court does not decide this question.

he visits. *Id.* This right does not, however, guarantee to the temporary visitor of a state the enjoyment of all the rights enjoyed by *bona fide* residents of that state.[5] The Supreme Court has explained:

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with the due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Toomer v. Witsell, 334 U.S. 385, 396, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948).

This Court finds that New York's permit scheme bears a close relationship to substantial and valid reasons for the disparate treatment of nonresident travelers, beyond the mere fact that they are citizens of other states. New York clearly has a strong interest in licensing firearms. "The licensing procedures set forth in the statute are designed

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[5] As stated by the court in *Martinez v. Bynum*:

> A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement . . . [generally] does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents.

461 U.S. 321, 328-29, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983).

to insure that only persons of acceptable background and character are permitted to carry and possess certain handguns. They are further designed to provide a method of recording information on the identity of persons possessing such weapons and the weapons themselves." *In re Davies*, 133 Misc.2d 38, 506 N.Y.S.2d 626, 628 (N.Y.Sup.Ct.1986); *accord People v. Moore*, 127 Misc.2d 402, 486 N.Y.S.2d 642, 644 (N.Y.City Crim.Ct.1985). Thus, the proper processing of permit applications is "vitally essential to public order and safety." *Federation of N.Y. State Rifle and Pistol Clubs, Inc. v. McGuire*, 101 Misc.2d 104, 420 N.Y.S.2d 602, 603 (N.Y.Sup.Ct.1979). In ruling on a permit application the licensing authority must investigate all statements in the application, take fingerprints and physical descriptive data and check the applicant's criminal record through federal and state authorities. *See* N.Y. Penal Law § 400.00(4). One court observed that "it would be impossible to thoroughly check first of all who is validly traveling through the state, and secondly make a complete check as to background and character." *People v. Perez*, 67 Misc.2d 911, 325 N.Y.S.2d 183, 186 (1971). The state defendants correctly contend that "[t]he practical implications of requiring New York to accept applications from all nonresidents are apparent. First, the strain on investigatory resources would be significantly increased. More importantly, however, the ability to obtain, and verify, information would be negatively impacted were New York officials required to make inquiries in other states. Nor can it be argued that New York could simply enter into agreements with other jurisdictions to do such work for the licensing county as to do so would run a significant risk of a lack of uniformity in the licensing regime."

The administrative problems in investigating, monitoring, enforcing and revoking permits where the applicant does not have residency, employment or business ties with New York and the resultant likelihood of errors, would be inimical to New York's scheme of licensing firearms as a

means of controlling their possession for the public good. Accordingly, as the state defendants contend, New York acted reasonably in denying the privilege to those with relatively remote contacts to New York. Likewise, allowing nonresidents with licenses from other states to carry weapons in New York without complying with New York requirements has the potential to present administrative problems and interfere with the achievement of New York's licensing goals.

The Court concludes that the factor of residence has a substantial and legitimate connection with the purposes of the permit scheme such that the disparate treatment of nonresidents is justifiable. *See Perez*, 325 N.Y.S.2d at 185 ("The substantial danger to the public interest which would be caused by the unrestricted flow of dangerous weapons into and through the state, possessed by countless travelers, warrants the degree of discrimination set out [in] the statute."); *Application of Ware*, 474 A.2d 131, 132-33 (Del.Sup.Ct.1984) (rejecting the petitioner's argument that Delaware's refusal to allow nonresidents to carry concealed deadly weapons in the state offends the Privileges and Immunities Clause and finding that "the factor of residence has a legitimate connection with the regulation in question so that such a classification is justifiable."). Thus, the Court rejects plaintiff's argument that New York's permit scheme impermissibly impairs his right to travel.

Equal Protection

As the Supreme Court has observed: "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Accordingly, the Supreme Court has "attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, [the court] will

uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* Where, however, a state statute burdens a fundamental right or targets a suspect class, it is subject to heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

Here, plaintiff asserts that the Second Amendment secures a fundamental individual right to keep and bear arms and that therefore New York's statutory permit scheme, which burdens nonresidents' exercise of that right, is subject to strict scrutiny under the Equal Protection Clause. Having concluded, however, that under the present state of the law, plaintiff has no individual Second Amendment right to own or possess weapons, the Court applies rational-basis review in evaluating plaintiff's equal protection challenge to the statutory scheme. *See Toner*, 728 F.2d at 128 (applying rational basis standard to equal protection challenge to federal firearms statute "since the right to possess a gun is clearly not a fundamental right"); *Silveira*, 312 F.3d at 1088 (same).

In undertaking rational-basis review, the Court notes that "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1986). Under the rational-basis standard, the party attacking a legislative classification bears the burden of demonstrating that there is no reasonable basis for the challenged distinction. *See Silveira*, 312 F.3d at 1089.

For the reasons set forth above in the discussion of the right to travel, the Court finds that New York has a reasonable basis for the challenged distinction. Accordingly, plaintiff has not demonstrated that there is no rational connection between the state's objective for its legislative classification and the means by which it classifies its citi-

zens. *See id.* at 1088-89. His equal protection argument lacks merit.

Substantive Due Process

In reviewing plaintiff's claim that he was deprived of substantive due process, the Court recognizes that "[t]he touchstone of due process is protection of the individual against arbitrary action of government[.]" *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *accord Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir.1999). "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense[.]" *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (citations and internal quotes omitted). "[T]he due process clause was intended to prevent government officials from abusing [their] power, or employing it as an instrument of oppression." *Id.* (citations and internal quotes omitted). "To this end, for half a century now [the Supreme Court has] . . . spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* Measured by this standard, plaintiff's allegations fall far short of stating a claim for deprivation of substantive due process.

CONCLUSION

Inasmuch as there are no material factual issues bearing on plaintiff's motion for interim relief, there is no need for a hearing with respect to that motion and no basis to consolidate such a hearing with a trial on the merits. Plaintiff has not demonstrated his entitlement to interim relief against any defendant because he has not demonstrated irreparable harm should an injunction not be granted, nor has he shown either a likelihood of success on the merits or sufficiently serious questions going to the merits. *See Resolution Trust Corp. v. Elman*, 949 F.2d 624, 626 (2d Cir.1991).

With respect to the state defendants' motion to dismiss the complaint, the Court has read the complaint generously, accepting the truth of and drawing all reasonable inferences from all well-pleaded factual allegations. *See*

Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir.1993). The Court concludes that it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. *See Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir.1994). Accordingly, the complaint is dismissed in its entirety insofar as it pertains to the state defendants.

It is therefore

ORDERED that plaintiff's motion for a preliminary injunction, permanent injunction and declaratory judgment pending final judgment (Dkt. No. 2) is denied as to all defendants; and it is further

ORDERED that plaintiff's motion to consolidate the trial on the merits with a hearing on the application for a preliminary injunction (Dkt. No. 7) is denied; and it is further

ORDERED that the cross motion by defendants George E. Pataki, in his official capacity as Governor of New York, Eliot Spitzer, in his official capacity as Attorney General of New York, and James W. McMahon, in his official capacity as Superintendent, New York State Police, to dismiss the complaint (Dkt. No. 10) is granted and all claims against them are dismissed in their entirety.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 21st day of July two thousand five.

DAVID D. BACH,
Plaintiff-Appellant,

v. No. 03-9123

GEORGE PATAKI, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK, ET AL.,
Defendants-Appellees.

[July 21, 2005]

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant David D. Bach. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by
/s/ Arthur M. Heller
Arthur M. Heller, Motions Staff Attorney

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Privileges and Immunities Clause, Article IV, Section 2, provides:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Penal Law § 265.00 provides:

§ 265.00 Definitions

As used in this article and in article four hundred, the following terms shall mean and include:

1. "Machine-gun" means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.

2. "Firearm silencer" means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearms to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearms.

3. "Firearm" means (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Firearm does not include an antique firearm.

4. "Switchblade knife" means any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

5. "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

5-a. "Pilum ballistic knife" means any knife which has a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.

5-b. "Metal knuckle knife" means a weapon that, when closed, cannot function as a set of metal knuckles, nor as a knife and when open, can function as both a set of metal knuckles as well as a knife.

6. "Dispose of" means to dispose of, give, give away, lease-loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.

7. "Deface" means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

8. "Gunsmith" means any person, firm, partnership, corporation or company who engages in the business of repairing, altering, assembling, manufacturing, cleaning, polishing, engraving or trueing, or who performs any mechanical operation on, any firearm, large capacity ammunition feeding device or machine-gun.

9. "Dealer in firearms" means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any assault weapon, large capacity ammunition feeding device, pistol or revolver.

10. "Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the

towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

11. "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

13. "Cane Sword" means a cane or swagger stick having concealed within it a blade that may be used as a sword or stilletto.

14. [See also subd. 14 below] "Chuka stick" means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

14. [See also subd. 14 above] "Antique firearm" means:

Any unloaded muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.

15. "Loaded firearm" means any firearm loaded with ammunition or any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.

15-a. "Electronic dart gun" means any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile.

15-b. "Kung Fu star" means a disc-like object with sharpened points on the circumference thereof and is designed for use primarily as a weapon to be thrown.

15-c. "Electronic stun gun" means any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person.

16. "Certified not suitable to possess a self-defense spray device, a rifle or shotgun" means that the director or physician in charge of any hospital or institution for mental illness, public or private, has certified to the superintendent of state police or to any organized police department of a county, city, town or village of this state, that a person who has been judicially adjudicated incompetent, or who has been confined to such institution for mental illness pursuant to judicial authority, is not suitable to possess a self-defense spray device, as defined in section 265.20 of this article, or a rifle or shotgun.

17. "Serious offense" means (a) any of the following offenses defined in the former penal law as in force and effect immediately prior to September first, nineteen hundred sixty-seven: illegally using, carrying or possessing a pistol or other dangerous weapon; making or possessing burglar's instruments; buying or receiving stolen property; unlawful entry of a building; aiding escape from prison; that kind of disorderly conduct defined in subdivi-

sions six and eight of section seven hundred twenty-two of such former penal law; violations of sections four hundred eighty-three, four hundred eighty-three-b, four hundred eighty-four-h and article one hundred six of such former penal law; that kind of criminal sexual act or rape which was designated as a misdemeanor; violation of section seventeen hundred forty-seven-d and seventeen hundred forty-seven-e of such former penal law; any violation of any provision of article thirty-three of the public health law relating to narcotic drugs which was defined as a misdemeanor by section seventeen hundred fifty-one-a of such former penal law, and any violation of any provision of article thirty-three-A of the public health law relating to depressant and stimulant drugs which was defined as a misdemeanor by section seventeen hundred forty-seven-b of such former penal law.

(b) [As amended by L.1999, c. 635, § 11. See, also, par. (b) below.] any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; that kind of loitering defined in subdivision three of section 240.35; endangering the welfare of a child; the offenses defined in article two hundred thirty-five; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the fourth degree; stalking in the third degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty.

(b) [As amended by L.1999, c. 635, § 15. See, also, par. (b) above.] any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; that kind of loitering defined in subdivision three of section 240.35; endangering the welfare of a child; the of-

fenses [illegible]ed in article two hundred thirty-five; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the third degree; stalking in the fourth degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty.

18. "Armor piercing ammunition" means any ammunition capable of being used in pistols or revolvers containing a projectile or projectile core, or a projectile or projectile core for use in such ammunition, that is constructed entirely (excluding the presence of traces of other substances) from one or a combination of any of the following: tungsten alloys, steel, iron, brass, bronze, beryllium copper, or uranium.

19. "Duly authorized instructor" means (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) by a person duly qualified and designated by the department of environmental conservation under paragraph d of subdivision six of section 11-0713 of the environmental conservation law as its agent in the giving of instruction and the making of certifications of qualification in responsible hunting practices.

20. "Disguised gun" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive and is designed and intended to appear to be something other than a gun.

21. "Semiautomatic" means any repeating rifle, shotgun or pistol, regardless of barrel or overall length, which utilizes a portion of the energy of a firing cartridge or

shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell.

22. "Assault weapon" means (a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least two of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a bayonet mount;

(iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor;

(v) a grenade launcher; or

(b) a semiautomatic shotgun that has at least two of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a fixed magazine capacity in excess of five rounds;

(iv) an ability to accept a detachable magazine; or

(c) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least two of the following characteristics:

(i) an ammunition magazine that attaches to the pistol outside of the pistol grip;

(ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;

(iv) a manufactured weight of fifty ounces or more when the pistol is unloaded;

(v) a semiautomatic version of an automatic rifle, shotgun or firearm; or

(d) any of the weapons, or functioning frames or receivers of such weapons, or copies or duplicates of such weapons, in any caliber, known as:

(i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);

(ii) Action Arms Israeli Military Industries UZI and Galil;

(iii) Beretta Ar70 (SC-70);

(iv) Colt AR-15;

(v) Fabrique National FN/FAL, FN/LAR, and FNC;

(vi) SWD M-10, M-11, M-11/9, and M-12;

(vii) Steyr AUG;

(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and

(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12;

(e) provided, however, that such term does not include: (i) any rifle, shotgun or pistol that (A) is manually operated by bolt, pump, lever or slide action; (B) has been rendered permanently inoperable; or (C) is an antique firearm as defined in 18 U.S.C. 921(a)(16);

(ii) a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition;

(iii) a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine;

(iv) a rifle, shotgun or pistol, or a replica or a duplicate thereof, specified in Appendix A to section 922 of 18

U.S.C. as such weapon was manufactured on October first, nineteen hundred ninety-three. The mere fact that a weapon is not listed in Appendix A shall not be construed to mean that such weapon is an assault weapon; or

(v) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or any of the weapons defined in paragraph (d) of this subdivision lawfully possessed prior to September fourteenth, nineteen hundred ninety-four.

23. "Large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device, manufactured after September thirteenth, nineteen hundred ninety-four, that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition; provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

New York Penal Law § 265.01 provides:

§ 265.01 Criminal possession of a weapon in the fourth degree

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star"; or

(2) He possesses any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or

(3) He knowingly has in his possession a rifle, shotgun or firearm in or upon a building or grounds, used for educational purposes, of any school, college or university, except the forestry lands, wherever located, owned and maintained by the State University of New York college of environmental science and forestry, without the written authorization of such educational institution; or

(4) He possesses a rifle or shotgun and has been convicted of a felony or serious offense; or

(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States; or

(6) He is a person who has been certified not suitable to possess a rifle or shotgun, as defined in subdivision sixteen of section 265.00, and refuses to yield possession of such rifle or shotgun upon the demand of a police officer. Whenever a person is certified not suitable to possess a rifle or shotgun, a member of the police department to which such certification is made, or of the state police, shall forthwith seize any rifle or shotgun possessed by such person. A rifle or shotgun seized as herein provided

shall not be destroyed, but shall be delivered to the headquarters of such police department, or state police, and there retained until the aforesaid certificate has been rescinded by the director or physician in charge, or other disposition of such rifle or shotgun has been ordered or authorized by a court of competent jurisdiction.

(7) He knowingly possesses a bullet containing an explosive substance designed to detonate upon impact.

(8) He possesses any armor piercing ammunition with intent to use the same unlawfully against another.

Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

New York Penal Law § 265.02 provides:

§ 265.02 Criminal possession of a weapon in the third degree

A person is guilty of criminal possession of a weapon in the third degree when:

(1) He commits the cri ıe of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; or

(2) He possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or

(3) He knowingly has in his possession a machine-gun, firearm, rifle or shotgun which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun, firearm, rifle or shotgun; or

(4) Such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven, constitute a violation of this section if such possession takes place in such person's home or place of business; or

(5)(i) Such person possesses twenty or more firearms; or (ii) such person possesses a firearm and has been previously convicted of a felony or a class A misdemeanor defined in this chapter within the five years immediately preceding the commission of the offense and such possession did not take place in the person's home or place of business; or

(6) Such person knowingly possesses any disguised gun; or

(7) Such person possesses an assault weapon; or

(8) Such person possesses a large capacity ammunition feeding device.

Criminal possession of a weapon in the third degree is a class D felony.

New York Penal Law § 265.20 provides:

§ 265.20 Exemptions

a. Sections 265.01, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15 and 270.05 shall not apply to:

1. Possession of any of the weapons, instruments, appliances or substances specified in sections 265.01, 265.02, 265.03, 265.04, 265.05 and 270.05 by the following:

(a) Persons in the military service of the state of New York when duly authorized by regulations issued by the adjutant general to possess the same.

(b) Police officers as defined in subdivision thirty-four of section 1.20 of the criminal procedure law.

(c) Peace officers as defined by section 2.10 of the criminal procedure law.

(d) Persons in the military or other service of the United States, in pursuit of official duty or when duly authorized by federal law, regulation or order to possess the same.

(e) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the same is necessary for manufacture, transport, installation and testing under the requirements of such contract.

(f) A person voluntarily surrendering such weapon, instrument, appliance or substance, provided that such surrender shall be made to the superintendent of the division of state police or a member thereof designated by such superintendent, or to the sheriff of the county in which such person resides, or in the county of Nassau or in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown in the county of Suffolk to the commissioner of police or a member of the police department thereof designated by such commissioner, or if such person resides in a city, town other than one named in this subparagraph, or

village to the police commissioner or head of the police force or department thereof or to a member of the force or department designated by such commissioner or head; and provided, further, that the same shall be surrendered by such person in accordance with such terms and conditions as may be established by such superintendent, sheriff, police force or department. Nothing in this paragraph shall be construed as granting immunity from prosecution for any crime or offense except that of unlawful possession of such weapons, instruments, appliances or substances surrendered as herein provided. A person who possesses any such weapon, instrument, appliance or substance as an executor or administrator or any other lawful possessor of such property of a decedent may continue to possess such property for a period not over fifteen days. If such property is not lawfully disposed of within such period the possessor shall deliver it to an appropriate official described in this paragraph or such property may be delivered to the superintendent of state police. Such officer shall hold it and shall thereafter deliver it on the written request of such executor, administrator or other lawful possessor of such property to a named person, provided such named person is licensed to or is otherwise lawfully permitted to possess the same. If no request to deliver the property is received by such official within two years of the delivery of such property, such official shall dispose of it in accordance with the provisions of section 400.05 of this chapter.

2. Possession of a machine-gun, large capacity ammunition feeding device, firearm, switchblade knife, gravity knife, pilum ballistic knife, billy or blackjack by a warden, superintendent, headkeeper or deputy of a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or detained as witnesses in criminal cases, in pursuit of official duty or when duly authorized by regulation or order to possess the same.

3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 or 400.01 of this chapter; provided, that such a license shall not preclude a conviction for the offense defined in subdivision three of section 265.01 of this article.

4. Possession of a rifle, shotgun or longbow for use while hunting, trapping or fishing, by a person, not a citizen of the United States, carrying a valid license issued pursuant to section 11-0713 of the environmental conservation law.

5. Possession of a rifle or shotgun by a person who has been convicted as specified in subdivision four of section 265.01 to whom a certificate of good conduct has been issued pursuant to section seven hundred three-b of the correction law.

6. Possession of a switchblade or gravity knife for use while hunting, trapping or fishing by a person carrying a valid license issued to him pursuant to section 11-0713 of the environmental conservation law.

7. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle or shotgun, the propelling force of which is gunpowder by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, air force, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy, air force or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in respon-

sible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation; or (d) an agent of the department of environmental conservation appointed to conduct courses in responsible hunting practices pursuant to article eleven of the environmental conservation law.

7-a. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person duly licensed to possess a pistol or revolver pursuant to section 400.00 or 400.01 of this chapter of a pistol or revolver duly so licensed to another person who is present at the time.

7-b. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person who has applied for a license to possess a pistol or revolver and prelicense possession of same pursuant to section 400.00 or 400.01 of this chapter, who has not been previously denied a license, been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others, and who has been approved for possession and use herein in accordance with section 400.00 or 400.01 of this chapter; provided however, that such possession shall be of a pistol or revolver duly licensed to and shall be used under the supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision and provided further that such possession and use be within the jurisdiction of the licensing officer with whom the person has made applica-

tion therefor or within the jurisdiction of the superintendent of state police in the case of a retired sworn member of the division of state police who has made an application pursuant to section 400.01 of this chapter.

7-c. Possession for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may be either air, compressed gas or springs, by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-d. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may be either air, compressed gas or springs, by a person under twelve years of age, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or

(c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-e. Possession and use of a pistol or revolver, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by an association or organization described in paragraph 7-a of this subdivision for the purpose of loading and firing the same by a person at least eighteen years of age but under the age of twenty-one who has not been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others; provided however, that such possession shall be of a pistol or revolver duly licensed to and shall be used under the immediate supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision.

8. The manufacturer of machine-guns, assault weapons, large capacity ammunition feeding devices, disguised guns, pilum ballistic knives, switchblade or gravity knives, billies or blackjacks as merchandise and the disposal and shipment thereof direct to a regularly constituted or appointed state or municipal police department, sheriff, policeman or other peace officer, or to a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, or to the military service of this state or of the United States.

9. The regular and ordinary transport of firearms as merchandise, provided that the person transporting such firearms, where he knows or has reasonable means of ascertaining what he is transporting, notifies in writing the

police commissioner, police chief or other law enforcement officer performing such functions at the place of delivery, of the name and address of the consignee and the place of delivery, and withholds delivery to the consignee for such reasonable period of time designated in writing by such police commissioner, police chief or other law enforcement officer as such official may deem necessary for investigation as to whether the consignee may lawfully receive and possess such firearms.

9-a. a. Except as provided in subdivision b hereof, the regular and ordinary transport of pistols or revolvers by a manufacturer of firearms to whom a license as a dealer in firearms has been issued pursuant to section 400.00 of this chapter, or by an agent or employee of such manufacturer of firearms who is otherwise duly licensed to carry a pistol or revolver and who is duly authorized in writing by such manufacturer of firearms to transport pistols or revolvers on the date or dates specified, directly between places where the manufacturer of firearms regularly conducts business provided such pistols or revolvers are transported unloaded, in a locked opaque container. For purposes of this subdivision, places where the manufacturer of firearms regularly conducts business includes, but is not limited to places where the manufacturer of firearms regularly or customarily conducts development or design of pistols or revolvers, or regularly or customarily conducts tests on pistols or revolvers, or regularly or customarily participates in the exposition of firearms to the public.

b. The transportation of such pistols or revolvers into, out of or within the city of New York may be done only with the consent of the police commissioner of the city of New York. To obtain such consent, the manufacturer must notify the police commissioner in writing of the name and address of the transporting manufacturer, or agent or employee of the manufacturer who is authorized in writing by such manufacturer to transport pistols or revolvers, the number, make and model number of the

firearms to be transported and the place where the manufacturer regularly conducts business within the city of New York and such other information as the commissioner may deem necessary. The manufacturer must not transport such pistols and revolvers between the designated places of business for such reasonable period of time designated in writing by the police commissioner as such official may deem necessary for investigation and to give consent. The police commissioner may not unreasonably withhold his consent.

10. Engaging in the business of gunsmith or dealer in firearms by a person to whom a valid license therefor has been issued pursuant to section 400.00.

11. Possession of a firearm or large capacity ammunition feeding device by a police officer or sworn peace officer of another state while conducting official business within the state of New York.

12. Possession of a pistol or revolver by a person who is a member or coach of an accredited college or university target pistol team while transporting the pistol or revolver into or through New York state to participate in a collegiate, olympic or target pistol shooting competition under the auspices of or approved by the national rifle association, provided such pistol or revolver is unloaded and carried in a locked carrying case and the ammunition therefor is carried in a separate locked container.

13. Possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized competitive pistol match or league competition under auspices of, or approved by, the National Rifle Association and in which he is a competitor, within forty-eight hours of such event or by a person who is a non-resident of the state while attending or traveling to or from an organized match sanctioned by the International Handgun Metallic Silhouette Association and in which he is a competitor, within forty-eight hours of such event, provided that he has not been previously con-

victed of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the match program, match schedule or match registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in accordance with the laws of his place of residence. For purposes of this subdivision, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

13-a. Except in cities not wholly contained within a single county of the state, possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized convention or exhibition for the display of or education about firearms, which is conducted under auspices of, or approved by, the National Rifle Association and in which he is a registered participant, within forty-eight hours of such event, provided that he has not been previously convicted of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the convention or exhibition program, convention or exhibition schedule or convention or exhibition registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in

accordance with the laws of his place of residence. For purposes of this paragraph, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

14. Possession in accordance with the provisions of this paragraph of a self-defense spray device as defined herein for the protection of a person or property and use of such self-defense spray device under circumstances which would justify the use of physical force pursuant to article thirty-five of this chapter.

(a) As used in this section "self-defense spray device" shall mean a pocket sized spray device which contains and releases a chemical or organic substance which is intended to produce temporary physical discomfort or disability through being vaporized or otherwise dispensed in the air or any like device containing tear gas, pepper or similar disabling agent.

(b) The exemption under this paragraph shall not apply to a person who:

(i) is less than eighteen years of age; or

(ii) has been previously convicted in this state of a felony or any assault; or

(iii) has been convicted of a crime outside the state of New York which if committed in New York would constitute a felony or any assault crime.

(c) The department of health, with the cooperation of the division of criminal justice services and the superin-

tendent of state police, shall develop standards and promulgate regulations regarding the type of self-defense spray device which may lawfully be purchased, possessed and used pursuant to this paragraph. The regulations shall include a requirement that every self-defense spray device which may be lawfully purchased, possessed or used pursuant to this paragraph have a label which states: "WARNING: The use of this substance or device for any purpose other than self-defense is a criminal offense under the law. The contents are dangerous – use with care. This device shall not be sold by anyone other than a licensed or authorized dealer. Possession of this device by any person under the age of eighteen or by anyone who has been convicted of a felony or assault is illegal. Violators may be prosecuted under the law."

15. Possession and sale of a self-defense spray device as defined in paragraph fourteen of this subdivision by a dealer in firearms licensed pursuant to section 400.00 of this chapter, a pharmacist licensed pursuant to article one hundred thirty-seven of the education law or by such other vendor as may be authorized and approved by the superintendent of state police.

(a) Every self-defense spray device shall be accompanied by an insert or inserts which include directions for use, first aid information, safety and storage information and which shall also contain a toll free telephone number for the purpose of allowing any purchaser to call and receive additional information regarding the availability of local courses in self-defense training and safety in the use of a self-defense spray device.

(b) Before delivering a self-defense spray device to any person, the licensed or authorized dealer shall require proof of age and a sworn statement on a form approved by the superintendent of state police that such person has not been convicted of a felony or any crime involving an assault. Such forms shall be forwarded to the division of state police at such intervals as directed by the superin-

tendent of state police. Absent any such direction the forms shall be maintained on the premises of the vendor and shall be open at all reasonable hours for inspection by any peace officer or police officer, acting pursuant to his or her special duties. No more than two self-defense spray devices may be sold at any one time to a single purchaser.

16. The terms "rifle," "shotgun," "pistol," "revolver," and "firearm" as used in paragraphs three, four, five, seven, seven-a, seven-b, nine, nine-a, ten, twelve, thirteen and thirteen-a of this subdivision shall not include a disguised gun or an assault weapon.

b. Section 265.01 shall not apply to possession of that type of billy commonly known as a "police baton" which is twenty-four to twenty-six inches in length and no more than one and one-quarter inches in thickness by members of an auxiliary police force of a city with a population in excess of one million persons or the county of Suffolk when duly authorized by regulation or order issued by the police commissioner of such city or such county respectively. Such regulations shall require training in the use of the police baton including but not limited to the defensive use of the baton and instruction in the legal use of deadly physical force pursuant to article thirty-five of this chapter. Notwithstanding the provisions of this section or any other provision of law, possession of such baton shall not be authorized when used intentionally to strike another person except in those situations when the use of deadly physical force is authorized by such article thirty-five.

[c. Redesignated b.]

c. Sections 265.01, 265.10 and 265.15 shall not apply to possession of billies or blackjacks by persons:

1. while employed in fulfilling contracts with New York state, its agencies or political subdivisions for the purchase of billies or blackjacks; or

2. while employed in fulfilling contracts with sister states, their agencies or political subdivisions for the purchase of billies or blackjacks; or

3. while employed in fulfilling contracts with foreign countries, their agencies or political subdivisions for the purchase of billies or blackjacks as permitted under federal law.

New York Penal Law § 400.00 provides:

§ 400.00 Licenses to carry, possess, repair and dispose of firearms

1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant (a) twenty-one years of age or older, provided, however, that where such applicant has been honorably discharged from the United States army, navy, marine corps, air force or coast guard, or the national guard of the state of New York, no such age restriction shall apply; (b) of good moral character; (c) who has not been convicted anywhere of a felony or a serious offense; (d) who has stated whether he or she has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; (e) who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act; (f) in the county of Westchester, who has successfully completed a firearms safety course and test as evidenced by a certificate of completion issued in his or her name and endorsed and affirmed under the penalties of perjury by a duly authorized instructor, except that: (i) persons who are honorably discharged from the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York, and produce evidence of official qualification in firearms during the term of service are not required to have completed those hours of a firearms safety course pertaining to the safe use, carrying, possession, maintenance and storage of a firearm; and (ii) persons who were licensed to possess a pistol or revolver prior to the effective date of this paragraph are not required to have completed a firearms safety course and test; and (g) concerning whom no good cause exists for the denial of the license. No person

shall engage in the business of gunsmith or dealer in firearms unless licensed pursuant to this section. An applicant to engage in such business shall also be a citizen of the United States, more than twenty-one years of age and maintain a place of business in the city or county where the license is issued. For such business, if the applicant is a firm or partnership, each member thereof shall comply with all of the requirements set forth in this subdivision and if the applicant is a corporation, each officer thereof shall so comply.

2. Types of licenses. A license for gunsmith or dealer in firearms shall be issued to engage in such business. A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place of business by a merchant or storekeeper; (c) have and carry concealed while so employed by a messenger employed by a banking institution or express company; (d) have and carry concealed by a justice of the supreme court in the first or second judicial departments, or by a judge of the New York city civil court or the New York city criminal court; (e) have and carry concealed while so employed by a regular employee of an institution of the state, or of any county, city, town or village, under control of a commissioner of correction of the city or any warden, superintendent or head keeper of any state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, provided that application is made therefor by such commissioner, warden, superintendent or head keeper; (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof; and (g) have, possess, collect and carry antique pistols which are defined as follows: (i) any single shot, muzzle loading pistol with a matchlock, flintlock, percussion cap, or similar type of ignition system manufactured in or before 1898, which is not designed for using

rimfire or conventional centerfire fixed ammunition; and (ii) any replica of any pistol described in clause (i) hereof if such replica –

(1) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(2) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

3. Applications. (a) Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. Blank applications shall, except in the city of New York, be approved as to form by the superintendent of state police. An application shall state the full name, date of birth, residence, present occupation of each person or individual signing the same, whether or not he is a citizen of the United States, whether or not he complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the good character, competency and integrity of each person or individual signing the application. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application. In case of a license as gunsmith or dealer in firearms, the photographs submitted shall be two inches square, and the application shall also state the previous occupation of each individual signing the same and the location of the place of such business, or of the bureau, agency, subagency, office or

branch office for which the license is sought, specifying the name of the city, town or village, indicating the street and number and otherwise giving such apt description as to point out reasonably the location thereof. In such case, if the applicant is a firm, partnership or corporation, its name, date and place of formation, and principal place of business shall be stated. For such firm or partnership, the application shall be signed and verified by each individual composing or intending to compose the same, and for such corporation, by each officer thereof.

(b) Application for an exemption under paragraph seven-b of subdivision a of section 265.20 of this chapter. Each applicant desiring to obtain the exemption set forth in paragraph seven-b of subdivision a of section 265.20 of this chapter shall make such request in writing of the licensing officer with whom his application for a license is filed, at the time of filing such application. Such request shall include a signed and verified statement by the person authorized to instruct and supervise the applicant, that has met with the applicant and that he has determined that, in his judgment, said applicant does not appear to be or poses a threat to be, a danger to himself or to others. He shall include a copy of his certificate as an instructor in small arms, if he is required to be certified, and state his address and telephone number. He shall specify the exact location by name, address and telephone number where such instruction will take place. Such licensing officer shall, no later than ten business days after such filing, request the duly constituted police authorities of the locality where such application is made to investigate and ascertain any previous criminal record of the applicant pursuant to subdivision four of this section. Upon completion of this investigation, the police authority shall report the results to the licensing officer without unnecessary delay. The licensing officer shall no later than ten business days after the receipt of such investigation, determine if the applicant has been previously denied a license, been convicted of a felony, or been convicted of a

serious offense, and either approve or disapprove the applicant for exemption purposes based upon such determinations. If the applicant is approved for the exemption, the licensing officer shall notify the appropriate duly constituted police authorities and the applicant. Such exemption shall terminate if the application for the license is denied, or at any earlier time based upon any information obtained by the licensing officer or the appropriate police authorities which would cause the license to be denied. The applicant and appropriate police authorities shall be notified of any such terminations.

4. Investigation. Before a license is issued or renewed, there shall be an investigation of all statements required in the application by the duly constituted police authorities of the locality where such application is made. For that purpose, the records of the appropriate office of the department of mental hygiene concerning previous or present mental illness of the applicant shall be available for inspection by the investigating officer of the police authority. In order to ascertain any previous criminal record, the investigating officer shall take the fingerprints and physical descriptive data in quadruplicate of each individual by whom the application is signed and verified. Two copies of such fingerprints shall be taken on standard fingerprint cards eight inches square, and one copy may be taken on a card supplied for that purpose by the federal bureau of investigation. When completed, one standard card shall be forwarded to and retained by the division of criminal justice services in the executive department, at Albany. A search of the files of such division and written notification of the results of the search to the investigating officer shall be made without unnecessary delay. Thereafter, such division shall notify the licensing officer and the executive department, division of state police, Albany, of any criminal record of the applicant filed therein subsequent to the search of its files. A second standard card, or the one supplied by the federal bureau of investigation, as the case may be, shall be forwarded to

that bureau at Washington with a request that the files of the bureau be searched and notification of the results of the search be made to the investigating police authority. The failure or refusal of the federal bureau of investigation to make the fingerprint check provided for in this section shall not constitute the sole basis for refusal to issue a permit pursuant to the provisions of this section. Of the remaining two fingerprint cards, one shall be filed with the executive department, division of state police, Albany, within ten days after issuance of the license, and the other remain on file with the investigating police authority. No such fingerprints may be inspected by any person other than a peace officer, who is acting pursuant to his special duties, or a police officer, except on order of a judge or justice of a court of record either upon notice to the licensee or without notice, as the judge or justice may deem appropriate. Upon completion of the investigation, the police authority shall report the results to the licensing officer without unnecessary delay.

4-a. Processing of license applications. Applications for licenses shall be accepted for processing by the licensing officer at the time of presentment. Except upon written notice to the applicant specifically stating the reasons for any delay, in each case the licensing officer shall act upon any application for a license pursuant to this section within six months of the date of presentment of such an application to the appropriate authority. Such delay may only be for good cause and with respect to the applicant. In acting upon an application, the licensing officer shall either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for.

4-b. Westchester county firearms safety course certificate. In the county of Westchester, at the time of application, the licensing officer to which the license application is made shall provide a copy of the safety course booklet to each license applicant. Before such license is issued, such licensing officer shall require that the applicant submit a

certificate of successful completion of a firearms safety course and test issued in his or her name and endorsed and affirmed under the penalties of perjury by a duly authorized instructor.

5. Filing of approved applications. The application for any license, if granted, shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York and, in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing authority of that county. The name and address of any person to whom an application for any license has been granted shall be a public record. Upon application by a licensee who has changed his place of residence such records or applications shall be transferred to the appropriate officer at the licensee's new place of residence. A duplicate copy of such application shall be filed by the licensing officer in the executive department, division of state police, Albany, within ten days after issuance of the license. Nothing in this subdivision shall be construed to change the expiration date or term of such licenses if otherwise provided for in law.

6. License: validity. Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. No license shall be transferable to any other person or premises. A license to carry or possess a pistol or revolver, not otherwise limited as to place or time of possession, shall be effective throughout the state, except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city. Such license to carry or possess shall be valid within the city of New York in the absence of a permit issued by the police commissioner of that city, provided that (a) the firearms covered by such license have been purchased

from a licensed dealer within the city of New York and are being transported out of said city forthwith and immediately from said dealer by the licensee in a locked container during a continuous and uninterrupted trip; or provided that (b) the firearms covered by such license are being transported by the licensee in a locked container and the trip through the city of New York is continuous and uninterrupted; or provided that (c) the firearms covered by such license are carried by armored car security guards transporting money or other valuables, in, to, or from motor vehicles commonly known as armored cars, during the course of their employment; or provided that (d) the licensee is a retired police officer as police officer is defined pursuant to subdivision thirty-four of section 1.20 of the criminal procedure law or a retired federal law enforcement officer, as defined in section 2.15 of the criminal procedure law, who has been issued a license by an authorized licensing officer as defined in subdivision ten of section 265.00 of this chapter; provided, further, however, that if such license was not issued in the city of New York it must be marked "Retired Police Officer" or "Retired Federal Law Enforcement Officer", as the case may be, and, in the case of a retired officer the license shall be deemed to permit only police or federal law enforcement regulations weapons; or provided that (e) the licensee is a peace officer described in subdivision four of section 2.10 of the criminal procedure law and the license, if issued by other than the city of New York, is marked "New York State Tax Department Peace Officer" and in such case the exemption shall apply only to the firearm issued to such licensee by the department of taxation and finance. A license as gunsmith or dealer in firearms shall not be valid outside the city or county, as the case may be, where issued.

7. License: form. Any license issued pursuant to this section shall, except in the city of New York, be approved as to form by the superintendent of state police. A license to carry or possess a pistol or revolver shall have attached

the licensee's photograph, and a coupon which shall be removed and retained by any person disposing of a firearm to the licensee. Such license shall specify the weapon covered by calibre, make, model, manufacturer's name and serial number, or if none, by any other distinguishing number or identification mark, and shall indicate whether issued to carry on the person or possess on the premises, and if on the premises shall also specify the place where the licensee shall possess the same. If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant. Any license as gunsmith or dealer in firearms shall mention and describe the premises for which it is issued and shall be valid only for such premises.

8. License: exhibition and display. Every licensee while carrying a pistol or revolver shall have on his or her person a license to carry the same. Every person licensed to possess a pistol or revolver on particular premises shall have the license for the same on such premises. Upon demand, the license shall be exhibited for inspection to any peace officer, who is acting pursuant to his or her special duties, or police officer. A license as gunsmith or dealer in firearms shall be prominently displayed on the licensed premises. A gunsmith or dealer of firearms may conduct business temporarily at a location other than the location specified on the license if such temporary location is the location for a gun show or event sponsored by any national, state, or local organization, or any affiliate of any such organization devoted to the collection, competitive use or other sporting use of firearms. Any sale or transfer at a gun show must also comply with the provisions of article thirty-nine-DD of the general business law. Records of receipt and disposition of firearms transactions conducted at such temporary location shall include the location of the sale or other disposition and shall be entered in the permanent records of the gunsmith or dealer

of firearms and retained on the location specified on the license. Nothing in this section shall authorize any licensee to conduct business from any motorized or towed vehicle. A separate fee shall not be required of a licensee with respect to business conducted under this subdivision. Any inspection or examination of inventory or records under this section at such temporary location shall be limited to inventory consisting of, or records related to, firearms held or disposed at such temporary locations. Failure of any licensee to so exhibit or display his or her license, as the case may be, shall be presumptive evidence that he or she is not duly licensed.

9. License: amendment. Elsewhere than in the city of New York, a person licensed to carry or possess a pistol or revolver may apply at any time to his licensing officer for amendment of his license to include one or more such weapons or to cancel weapons held under license. If granted, a record of the amendment describing the weapons involved shall be filed by the licensing officer in the executive department, division of state police, Albany. Notification of any change of residence shall be made in writing by any licensee within ten days after such change occurs, and a record of such change shall be inscribed by such licensee on the reverse side of his license. Elsewhere than in the city of New York, and in the counties of Nassau and Suffolk, such notification shall be made to the executive department, division of state police, Albany, and in the city of New York to the police commissioner of that city, and in the county of Nassau to the police commissioner of that county, and in the county of Suffolk to the licensing officer of that county, who shall, within ten days after such notification shall be received by him, give notice in writing of such change to the executive department, division of state police, at Albany.

10. License: expiration, certification and renewal. Any license for gunsmith or dealer in firearms and, in the city of New York, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior

to the first day of July, nineteen hundred sixty-three and not limited to expire on an earlier date fixed in the license, shall expire not more than three years after the date of issuance. In the counties of Nassau, Suffolk and Westchester, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not limited to expire on an earlier date fixed in the license, shall expire not more than five years after the date of issuance; however, in the county of Westchester, any such license shall be certified prior to the first day of April, two thousand, in accordance with a schedule to be contained in regulations promulgated by the commissioner of the division of criminal justice services, and every such license shall be recertified every five years thereafter. For purposes of this section certification shall mean that the licensee shall provide to the licensing officer the following information only: current name, date of birth, current address, and the make, model, caliber and serial number of all firearms currently possessed. Such certification information shall be filed by the licensing officer in the same manner as an amendment. Elsewhere than in the city of New York and the counties of Nassau, Suffolk and Westchester, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not previously revoked or cancelled, shall be in force and effect until revoked as herein provided. Any license not previously cancelled or revoked shall remain in full force and effect for thirty days beyond the stated expiration date on such license. Any application to renew a license that has not previously expired, been revoked or cancelled shall thereby extend the term of the license until disposition of the application by the licensing officer. In the case of a license for gunsmith or dealer in firearms, in counties having a population of less than two hundred thousand inhabitants, photographs and fingerprints shall be submitted on original applications and upon renewal thereafter only at six year intervals. Upon

satisfactory proof that a currently valid original license has been despoiled, lost or otherwise removed from the possession of the licensee and upon application containing an additional photograph of the licensee, the licensing officer shall issue a duplicate license.

11. License: revocation and suspension. The conviction of a licensee anywhere of a felony or serious offense shall operate as a revocation of the license. A license may be revoked or suspended as provided for in section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act. Except for a license issued pursuant to section 400.01 of this article, a license may be revoked and cancelled at any time in the city of New York, and in the counties of Nassau and Suffolk, by the licensing officer, and elsewhere than in the city of New York by any judge or justice of a court of record; a license issued pursuant to section 400.01 of this article may be revoked and cancelled at any time by the licensing officer or any judge or justice of a court of record. The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality.

12. Records required of gunsmiths and dealers in firearms. Any person licensed as gunsmith or dealer in firearms shall keep a record book approved as to form, except in the city of New York, by the superintendent of state police. In the record book shall be entered at the time of every transaction involving a firearm the date, name, age, occupation and residence of any person from whom a firearm is received or to whom a firearm is delivered, and the calibre, make, model, manufacturer's name and serial number, or if none, any other distinguishing number or identification mark on such firearm. Before delivering a firearm to any person, the licensee shall require him to produce either a license valid under this section to carry or possess the same, or proof of lawful authority as an exempt person pursuant to section 265.20. In addition,

before delivering a firearm to a peace officer, the licensee shall verify that person's status as a peace officer with the division of state police. After completing the foregoing, the licensee shall remove and retain the attached coupon and enter in the record book the date of such license, number, if any, and name of the licensing officer, in the case of the holder of a license to carry or possess, or the shield or other number, if any, assignment and department, unit or agency, in the case of an exempt person. The original transaction report shall be forwarded to the division of state police within ten days of delivering a firearm to any person, and a duplicate copy shall be kept by the licensee. The record book shall be maintained on the premises mentioned and described in the license and shall be open at all reasonable hours for inspection by any peace officer, acting pursuant to his special duties, or police officer. In the event of cancellation or revocation of the license for gunsmith or dealer in firearms, or discontinuance of business by a licensee, such record book shall be immediately surrendered to the licensing officer in the city of New York, and in the counties of Nassau and Suffolk, and elsewhere in the state to the executive department, division of state police.

12-a. State police regulations applicable to licensed gunsmiths engaged in the business of assembling or manufacturing firearms. The superintendent of state police is hereby authorized to issue such rules and regulations as he deems reasonably necessary to prevent the manufacture and assembly of unsafe firearms in the state. Such rules and regulations shall establish safety standards in regard to the manufacture and assembly of firearms in the state, including specifications as to materials and parts used, the proper storage and shipment of firearms, and minimum standards of quality control. Regulations issued by the state police pursuant to this subdivision shall apply to any person licensed as a gunsmith under this section engaged in the business of manufacturing or assembling firearms, and any violation

thereof shall subject the licensee to revocation of license pursuant to subdivision eleven of this section.

12-c.[1] Firearms records. (a) Every employee of a state or local agency, unit of local government, state or local commission, or public or private organization who possesses a firearm or machine-gun under an exemption to the licensing requirements under this chapter, shall promptly report in writing to his employer the make, model, calibre and serial number of each such firearm or machine-gun. Thereafter, within ten days of the acquisition or disposition of any such weapon, he shall furnish such information to his employer, including the name and address of the person from whom the weapon was acquired or to whom it was disposed.

(b) Every head of a state or local agency, unit of local government, state or local commission, public authority or public or private organization to whom an employee has submitted a report pursuant to paragraph (a) of this subdivision shall promptly forward such report to the superintendent of state police.

(c) Every head of a state or local agency, unit of local government, state or local commission, public authority, or any other agency, firm or corporation that employs persons who may lawfully possess firearms or machine-guns without the requirement of a license therefor, or that employs persons licensed to possess firearms or machine-guns, shall promptly report to the superintendent of state police, in the manner prescribed by him, the make, model, calibre and serial number of every firearm or machine-gun possessed by it on the effective date of this act for the use of such employees or for any other use. Thereafter, within ten days of the acquisition or disposition of any such weapon, such head shall report such information to the superintendent of the state police, including the name

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[1] So in original. No subd. 12-b has been enacted.

and address of the person from whom the weapon was acquired or to whom it was disposed.

13. Expenses. The expense of providing a licensing officer with blank applications, licenses and record books for carrying out the provisions of this section shall be a charge against the county, and in the city of New York against the city.

14. Fees. In the city of New York and the county of Nassau, the annual license fee shall be twenty-five dollars for gunsmiths and fifty dollars for dealers in firearms. In such city, the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following fees: for each license to carry or possess a pistol or revolver, not less than three dollars nor more than ten dollars as may be determined by the legislative body of the county; for each amendment thereto, three dollars, and five dollars in the county of Suffolk; and for each license issued to a gunsmith or dealer in firearms, ten dollars. The fee for a duplicate license shall be five dollars. The fee for processing a license transfer between counties shall be five dollars. The fee for processing a license or renewal thereof for a qualified retired police officer as defined under subdivision thirty-four of section 1.20 of the criminal procedure law, or a qualified retired sheriff, undersheriff, or deputy sheriff of the city of New York as defined under subdivision two of section 2.10 of the criminal procedure law, or a qualified retired bridge and tunnel officer, sergeant or lieutenant of the triborough bridge and tunnel authority as defined under subdivision twenty of section 2.10 of the criminal procedure law, or a qualified retired uniformed court officer in the unified court system, or a qualified retired court clerk in the unified court system in the first and second judicial departments, as defined in paragraphs a and b of subdivision twenty-one of section 2.10 of the criminal procedure

law or a retired correction officer as defined in subdivision twenty-five of section 2.10 of the criminal procedure law shall be waived in all counties throughout the state.

15. Any violation by any person of any provision of this section is a class A misdemeanor.

16. Unlawful disposal. No person shall except as otherwise authorized pursuant to law dispose of any firearm unless he is licensed as gunsmith or dealer in firearms.

17. Applicability of section. The provisions of article two hundred sixty-five of this chapter relating to illegal possession of a firearm, shall not apply to an offense which also constitutes a violation of this section by a person holding an otherwise valid license under the provisions of this section and such offense shall only be punishable as a class A misdemeanor pursuant to this section. In addition, the provisions of such article two hundred sixty-five of this chapter shall not apply to the possession of a firearm in a place not authorized by law, by a person who holds an otherwise valid license or possession of a firearm by a person within a one year period after the stated expiration date of an otherwise valid license which has not been previously cancelled or revoked shall only be punishable as a class A misdemeanor pursuant to this section.

New York Penal Law § 400.01 provides:

§ 400.01 License to carry and possess firearms for retired sworn members of the division of state police

1. A license to carry or possess a firearm for a retired sworn member of the division of state police shall be granted in the same manner and upon the same terms and conditions as licenses issued under section 400.00 of this article provided, however, that applications for such license shall be made to, and the licensing officer shall be, the superintendent of state police.

2. For purposes of this section, a "retired sworn member of the division of state police" shall mean a former sworn member of the division of state police, who upon separation from the division of state police was immediately entitled to receive retirement benefits under the provisions of the retirement and social security law.

3. The provisions of this section shall only apply to license applications made or renewals which must be made on or after the effective date of this section.[1] A license to carry or possess a pistol or revolver issued pursuant to the provisions of section 400.00 of this article to a person covered by the provisions of this section shall be valid until such license would have expired pursuant to the provisions of section 400.00 of this article; provided that, on or after the effective date of this section, an application or renewal of such license shall be made pursuant to the provisions of this section.

4. Except for the designation of the superintendent of state police as the licensing officer for retired sworn members of the division of state police, all of the provisions and requirements of section 400.00 of this article and any other provision of law shall be applicable to individuals licensed pursuant to this section. In addition all provi-

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[1] L.1999, c. 210, effective November 1, 1999.

sions of section 400.00 of this article, except for the designation of the superintendent of state police as licensing officer are hereby deemed applicable to individuals licensed pursuant to this section.

Supreme Court of the United States

Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

October 11, 2005

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: David D. Bach
v. George Pataki, Governor of New York,et al.
Application No. 05A313

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on October 11, 2005 extended the time to and including December 19, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ HEATHER TRANT
Heather Trant
Case Analyst

[attached notification list omitted]